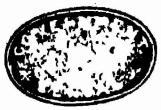

REPORTS OF CASES

HEARD AND DETERMINED

BY

THE JUDICIAL COMMITTEE,

AND

THE LORDS

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ON

APPEAL FROM THE SUPREME AND SUDDER DEWANNY COURTS

IN

THE EAST INDIES.

BY EDMUND F. MOORE, ESQ.,
BARRISTER-AT-LAW.

VOL. V.

1849-54.

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LIST

OF THE

JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C 41,

FOR HEARING AND REPORTING ON APPEALS TO HER MAJESTY IN COUNCIL.

1849–54.

The Earl *Granville*, Lord President

The Marquis of *Lansdowne*, formerly Lord President.

The Duke of *Buccleuch*, formerly Lord President.

Lord *Cranworth*, Lord High Chancellor of Great Britain.

Lord *Lyndhurst*, formerly Lord High Chancellor of Great Britain.

Lord *Cottenham*, formerly Lord High Chancellor of Great Britain (*deceased*).

Lord *Brougham*, formerly Lord High Chancellor of Great Britain.

Lord *Truro*, late Lord High Chancellor of Great Britain.

Lord *Denman*, late Lord Chief Justice of the Court of Queen's Bench (*deceased*)

Lord *Langdale*, late Master of the Rolls (*deceased*).

Lord *Campbell*, Lord Chief Justice of the Court of Queen's Bench.

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The Right Hon. *Thomas Erskine*, late one of the Judges of the Court of Common Pleas

Sir *James Parke*, Knt., one of the Barons of the Court of Exchequer.

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Sir *Frederick Pollock*, Knt., Lord Chief Baron of the Court of Exchequer.

Sir *John Jervis*, Knt., Lord Chief Justice of the Court of Common Pleas.

Sir *John Romilly*, Knt., Master of the Rolls.

Sir *George James Turner*, Knt, one of the Lords Justices of the Court of Appeal in Chancery.

Sir *John Patteson*, Knt., late one of the Judges of the Court of Queen's Bench.

Sir *John Dodson*, D.C.L., Knt., Judge of the Prerogative Court.

TABLE

OF

CASES REPORTED.

VOL. V.—PART I.

Page

Anund Lal Sing Deo *v.* Maharaja Dheraj Gurrood Narayun Deo—*Family custom. Succession. Raj. Grant by Raja in possession not binding on his successor. Resumption. Whether the Zemindary of Pacheet constitutes a Raj, Quære* 82

Baboo Kasi Persad Narain *v.* Mussumat Kawalbasi Kooer—*Tumleeknamah. Deed of Gift. Practice. Appeal. Abatement. Substitution of parties in India. Objection at hearing. Delay in transmitting Record. Peremptory order to Registrar of Sudder Court* 146

Bengal, Bank of, *v.* Fagan (*See "Bank of Bengal* v. *Macleod"*) . 27

Bengal, Bank of, *v.* Macleod—*Power of Attorney. Principal and Agent. Pledging. East India Company's Notes. Indorsement. The cases of Gill* v. *Cubitt* (3 *B. & C.* 466), *and Down* v. *Halling* (4 *B. & C.* 330), *overruled. Practice. Technical objection not taken in the Court below. Reversal of Judgment. Verdict for Appellant* . . . .

Doolubdass Pettamberdass *v.* Ramloll Thackoorseydass—*Gaming. Wager contracts. Auction sale. Conspiracy. Fraud. Regrating. Act of Indian Legislature, No.* 21, *of* 1848. *Construction. Statutes, retrospective operation of. Review of Cases, Moon* v. *Durden* (2 *Exch. Rep.* 22), and *Levi* v. *Levi* (6 *Car. & Pay*, 239) 109

East India Company *v.* Oditchurn Paul—*Statute of Limitations* (21 *Jac., c.* 16), *extends to India. Statute,* 9 *Geo. IV.*,

Page

c. 14 (extended to India by Indian Act, No. XIV. of 1840), *applies to actions pending at the time the Statute was introduced into India. Assumpsit. Answer to Bill of Discovery. Evidence. Practice. New trial. Materiality of proof rejected* 43

Loughnan *v.* Haji Joosub Bhulladina—*Bombay Charter* (1823), *construction of. Practice of the High Court of Admiralty in England regulate proceedings in Supreme Court at Bombay, in Admiralty causes. Appeal. Peremption. Practice. Objection at hearing. Costs* 137

Muttyloll Seal *v.* Annundochunder Sandle—*Conveyance in fee. Parol defeazance. Mortgage. Redemption* 72

Raja Sutti Churn Ghosal *v.* Sri Mudden Kishore Indoo—*Practice. Deed of Compromise. Appeal. Petition to withdraw and carry into effect the terms of deed* . . 107

Rawut Urjun Sing *v.* Rawut Ghunsiam Sing—*Family Custom. Succession. Indivisible Zemindary. Partition* . . . 169

BENGAL SECRETARIAT LIBRARY

A

TABLE

OF THE

CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Annundochunder Sandle, Muttyloll Seal *v.* 72
Anund Lal Sing Deo *v.* Maharaja Dheraj Gurrood Narayun Deo 82

B.

Baboo Kasi Persad Narain *v.* Mussumat Kawalbasi Kooer . 146
Benares, The Collector of, Douglas *v.* 271
Bengal, The Bank of, *v.* Fagan 27
Bengal, The Bank of, *v.* Macleod 1
Bengal, The Government of, *v.* Nawab Jafur Hossein Khan . 467

D.

Dent, Muttyloll Seal *v.* 328
Doolubdass Pettamberdass *v* Ramloll Thackoorseydass . . 109
Douglas *v.* The Collector of Benares 271

E.

East India Company *v.* Nuthumbadoo Veerasawmy Moodelly 217
East India Company *v.* Oditchurn Paul 43

F.

Fagan, The Bank of Bengal *v.* 27

H.

Haji Joosub Bhulladina, Loughnan *v.* 457
Heycock, Jenkins *v.* 361
Hydroos, The ship 137

J.

Jenkins *v.* Heycock 361

K.

PAGE
Kadir Bukhsh Khan *v.* Mussumatain Fusseeh oon-Nissa . 413

L.

Loughnan *v.* Haji Joosub Bhulladina 137
Lulloobhoy Mottichund, Ruckmaboye *v.* 234

M.

McKellar *v.* Wallace 372
Macleod, The Bank of Bengal *v.* 1
Maharaja Dheraj Gurrood Narayun Deo, Anund Lal Sing Deo *v.* 82
Meerza Ally Mahomed Shoostry, Musadee Mahomed Cazum Sherazee *v.* 187, 196
Musadee Mahomed Cazum Sherazee *v.* Meerza Ally Mahomed Shoostry 187, 196
Mussumat Kawalbasi Koeer, Baboo Kasi Persad Narain *v.* . 146
Mussumatain Fusseeh-oon-Nissa, Kadir Bukhsh Khan *v.* . 413
Muttyloll Seal *v.* Annundochunder Sandle 72
Muttyloll Seal *v.* Dent 328

N.

Nawab Amin-ood-Dowlah *v.* Syud Hoshun Ali Khan . . 199
Nawab Jafur Hossein Khan, The Bengal Government *v.* . 467
Nawab of Surat, *In Re* 499
Nuthumbadoo Veerasawmy Moodelly, The East India Company *v.* 217

O.

Oditchurn Paul, The East India Company *v.* 43

R.

Rai Sri Kishen *v.* Rai Huri Kishen 432
Rajah Bommaranjeo Bahadoor, *In Re* 298
Rajah Sutti Churn Ghosal *v.* Sri Mudden Kishore Indoo . 107
Rajah Vassareddy Lutchmeputty Naidoo, *In Re* . . . 300
Ramloll Thackoorseydass, Dooloobdass Pettamberdass *v.* . 109
Rawut Urjun Sing *v.* Rawut Ghunsiam Sing . . . 169
Ruckmaboye, Her Highness, *v.* Lulloobhoy Mottichund . 234

S.

PAGE
Sreemunt Lal Khan, Watson *v.* 447
Sibnarain Ghose, *In Re* 322
Sri Mudden Kishore Indoo, Rajah Sutti Churn Ghosal, *v.* . 107
Syud Roshun Ali Khan, Nawab Amin-ood-Dowlah *v.* . . 199

W.

Wallace, McKellar *v* 372
Watson *v.* Sreemunt Lal Khan 447

APPENDIX.

Order in Council of the 13th *June*, 1853, relating to the practice of the Judicial Committee ix
Act, 14 & 15 *Vict.*, c. 83, clauses XV. and XVI., to improve the administration of Justice in the Court of Chancery, and in the Judicial Committee of the Privy Council . xiii

BENGAL SECRETARIAT
LIBRARY.

APPENDIX.

ORDER IN COUNCIL.

At the Court at Buckingham Palace, the 13th of June, 1853.

Present:

THE QUEEN'S MOST EXCELLENT MAJESTY.
HIS ROYAL HIGHNESS PRINCE ALBERT.

Lord President.	Earl of Aberdeen.
Lord Steward.	Earl of Clarendon.
Duke of Newcastle.	Viscount Palmerston.
Duke of Wellington.	Mr. Herbert.
Lord Chamberlain.	Sir James Graham, Bart.

WHEREAS there was this day read at the Board a Report from the Right Honourable the Lords of the Judicial Committee of the Privy Council, dated the 30th of May last past, humbly setting forth that the Lords of the Judicial Committee have taken into consideration the practice of the Committee, with a view to greater economy, despatch, and efficiency in the appellate jurisdiction of Her Majesty in Council, and that their Lordships have agreed humbly to report to Her Majesty that it is expedient that certain changes should be made in the existing practice in Appeals, and recommending that certain Rules and Regulations therein set forth should henceforth be observed, obeyed, and carried into execution, provided Her Majesty is pleased to approve the same:

Her Majesty having taken the said Report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and of the Rules and Regulations set forth therein, in the words following, videlicet;

Appellant, when successful, may recover costs of appeal.

I. That, any former usage or practice of Her Majesty's Privy Council notwithstanding, an Appellant who shall succeed in obtaining a reversal or material alteration of any judgment, decree, or order appealed from, shall be entitled to recover the costs of the appeal from the Respondent, except in cases in which the Lords of the Judicial Committee may think fit otherwise to direct.

Transcripts to be sent to Registrar of Privy Council.

II. That the Registrar or other proper Officer having the custody of records in any Court, or special jurisdiction, from which an appeal is brought to Her Majesty in Council, be directed to send by post, with all possible despatch, one certified copy of the transcript record in such cause to the Registrar of Her Majesty's Privy Council, Whitehall; and all such transcripts be registered in the Privy Council Office, with the date of their arrival, the names of the parties, and the date of the sentence appealed from; and that such transcript be accompanied by a correct and complete index of all the papers, documents, and exhibits in the cause; and that the Registrar of the Court appealed from, or other proper Officer of such Court, be directed to omit from such transcript all merely formal documents, provided such omission be stated and certified in the said index of papers; and that especial care be taken not to allow any document to be set forth more than once in such transcript; and that no other certified copies of the record be transmitted to agents in England by or on behalf of the parties in the suit; and that the fees and expenses incurred and paid for the preparation of such transcript be stated and certified upon it by the Registrar or other Officer preparing the same.

Transcripts may be printed abroad.

III. That when the record of proceedings or evidence in the cause appealed has been printed or partly printed abroad, the Registrar or other proper Officer of the Court from which the appeal is brought shall be bound to send home the same in a printed form, either wholly or so far as the same may have been printed, and that he do certify the same to be correct, on two copies, by signing his name on every printed sheet, and by affixing the seal, if any, of the Court appealed from, to these copies, with the sanction of the Court.

And that in all cases in which the parties in appeals shall

think fit to have the proceedings printed abroad, they shall be at liberty to do so, provided they cause fifty copies of the same to be printed in folio, and transmitted, at their expense, to the Registrar of the Privy Council, two of which printed copies shall be certified as above by the Officers of the Court appealed from; and in this case no further expense for copying or printing the record will be incurred or allowed in England.

Written transcripts to be printed by Her Majesty's printer.

IV. That on the arrival of a written transcript of appeal at the Privy Council Office, Whitehall, the Appellant, or the agent of the Appellant prosecuting the same, shall be at liberty to call on the Registrar of the Privy Council to cause it, or such part thereof as may be necessary for the hearing of the case, and likewise all such parts thereof as the Respondent or his agents may require, to be printed by Her Majesty's Printer, or by any other printer on the same terms, the Appellant or his agent engaging to pay the cost of preparing a copy for the printer, at a rate not exceeding one shilling per brief sheet, and likewise the cost of printing such Record or Appendix, and that one hundred copies of the same to be struck off, whereof thirty copies are to be delivered to the agents on each side, and forty kept for the use of the Judicial Committee; and that no other fees for Solicitors' copies of the transcript, or for drawing the Joint Appendix, be henceforth allowed, the Solicitors on both sides being allowed to have access to the original papers at the Council Office, and to extract or cause to be extracted and copied such parts thereof as are necessary for the preparation of the petition of appeal, at the stationers' charge, not exceeding one shilling per brief sheet.

Transcripts to be printed within a certain time.

V. That a certain time be fixed within which it shall be the duty of the Appellant or his agent to make such application for the printing of the transcript, and that such time be within the space of six calendar months from the arrival of the transcript and the registration thereof, in all matters brought by appeal from Her Majesty's Colonies and Plantations east of the Cape of Good Hope, or from the territories of the East India Company, and within the space of three months in all matters brought by appeal from any other part of Her Majesty's dominions abroad; and that in default of the Appellant or his agent

taking effectual steps for the prosecution of the appeal within such time or times respectively, the appeal shall stand dismissed without further order, and that a report of the same be made to the Judicial Committee by the Registrar of the Privy Council, at their Lordships' next sitting.

Appeals may be heard in the form of a special case.

VI. That whenever it shall be found that the decision of a matter on appeal is likely to turn exclusively on a question of law, the agents of the parties, with the sanction of the Registrar of the Privy Council, may submit such question of law to the Lords of the Judicial Committee in the form of a special case, and print such parts only of the transcript as may be necessary for the discussion of the same: Provided that nothing herein contained shall in any way bar or prevent the Lords of the Judicial Committee from ordering the full discussion of the whole case, if they shall so think fit; and that in order to promote such arrangements and simplifications of the matter in dispute, the Registrar of the Privy Council may call the agents of the parties before him, and having heard them, and examined the transcript, may report to the Committee as to the nature of the proceedings.

And Her Majesty is further pleased to order, and it is hereby ordered, that the foregoing Rules and Regulations be punctually observed, obeyed, and carried into execution, in all Appeals or Petitions, and complaints in the nature of Appeals brought to Her Majesty, or to Her heirs and successors, in Council, from Her Majesty's Colonies and Plantations abroad, and from the Channel Islands, or the Isle of Man, and from the territories of the East India Company, whether the same be from Courts of Justice or from Special Jurisdictions, other than Appeals from Her Majesty's Courts of Vice-Admiralty, to which the said Rules are not to be applied.

Whereof the Judges and Officers of Her Majesty's Courts of Justice abroad, and the Judges and the Officers of the Superior Courts of the East India Company, and all other persons whom it may concern, are to take notice, and govern themselves accordingly.

WM. L. BATHURST.

Clauses XV and XVI of the 14th & 15th *Vict.*, c. 83

An Act to improve the administration of Justice in the Court of Chancery, and in the Judicial Committee of the Privy Council

Judges, if Privy Councillors, to be of the Judicial Committee

XV. Every person holding, or who has held, the office of a Judge of the Court of Appeal in Chancery, shall, if a member of Her Majesty's Privy Council, be a member of the Judicial Committee of the Privy Council

No matter to be heard, &c, by Judicial Committee unless three members are present, exclusive of Lord President

XVI So much of the Act of the Session holden in the third and fourth years of King *William* the Fourth, Chapter Forty-one, as provides that no matter shall be heard, nor shall any Order, Report, or Recommendation be made, by the Judicial Committee of the Privy Council, in pursuance of that Act, unless in the presence of at least Four Members of the said Committee, shall be repealed, and no matter shall be heard, nor shall any Order, Report, or Recommendation be made, by the Judicial Committee in pursuance of the said Act or any other Act, unless in the presence of at least Three Members of the said Committee, exclusive of the Lord President of Her Majesty's Privy Council for the time being

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ON APPEAL FROM THE SUPREME AND SUDDER DEWANNY COURTS, IN THE EAST INDIES.

THE BANK OF BENGAL - - - *Appellants*,

AND

JAMES WILLIAM MACLEOD - - *Respondent*.*

On Appeal from the Supreme Court at Fort William in Bengal.

5th & 6th July, 1849.

THIS was an action of detinue and debt brought by the Respondent against the Appellants. The declara-

The payee of promissory notes of the East India Company, by a power of attorney, authorized his agents at *Calcutta* to "sell, endorse, and assign" the notes. These notes were transferable by endorsement, payable to bearer. The agents, in their character of private bankers, borrowed money of the Bank of *Bengal*, offering, as security, these promissory notes. The Bank made the advance, and the agents endorsed the notes, such endorsement purporting to be as attorney for their principal, and deposited them with the

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillor,—*Assessor*,—The Right Hon. Sir Edward Ryan.

1849.

THE BANK OF BENGAL v. MACLEOD.

tion contained three counts, the first in detinue, the others in debt. The first count alleged, that the Plaintiff was lawfully possessed of three several securities for money, that is to say, three promissory notes of the East India Company, commonly called Company's paper, all respectively of the four per cent. loan, dated 1st *May*, 1832, numbered, and for the following amounts, respectively: No. 11,914, for S. R. 14,000, No. 13,612, for S. R. 5,000, and No. 13,397, for S. R. 5,000, which the Defendants unjustly detained from the Plaintiff. The second count was for money received by the Defendants to the use of the Plaintiff, and the third count was for interest. The particulars of demand stated that the action was brought to recover the three several Company's papers in the first count mentioned, or the value thereof, with interest, if sold or otherwise disposed of.

To the first count the Defendants pleaded, first, *non detinent;* secondly, that the Plaintiff was not lawfully possessed of the securities therein mentioned; thirdly, that as to the Company's paper, No. 13,397, the same was transferable by endorsement, and that the

Bank, by way of collateral security for their personal liability, at the same time authorising the Bank, in default of payment, to sell the notes in reimbursement of the advances. The agents afterwards became insolvent, and default having been made in payment, the Bank sold the notes, and realised the amount of their loan.

Held, that the endorsement of the notes by the agents of the payee to the Bank was within the scope of the authority given to them by the power of attorney, and that the payee could not recover in detinue against the Bank.

The rule laid down in the cases of *Gill* v. *Cubitt* (3 B. & C. 466) and *Down* v. *Halling* (4 B. & C. 330), that the negligence of a party taking a negotiable instrument fixes him with the defective title of the party passing it, observed upon, and those cases declared to be no longer law.

This Court will not entertain a purely technical objection to a party's right of action, which has not been made in the Court below.

Upon the reversal of the judgment of the Supreme Court at *Calcutta*, finding for the Plaintiff, this Court, in the circumstances of the constitution of the Supreme Court, directed a verdict to be entered for the Defendants, instead of awarding a *venire de novo*.

Plaintiff, before the detention of the same by the Defendants, endorsed the same in blank, and delivered it to *Alexander Donald Macleod*, and that *A. D. Macleod* afterwards endorsed it to, and pledged, and deposited it with, the Defendants, as a pledge and security for the payment of a sum of Rs. 4,500 then advanced by the Defendants to him, together with 6½ per cent. interest, and for the payment of all other and future advances made, and to be made, by them to him, with interest at 12 per cent., and with power and authority to the Defendants to sell and dispose of such Company's paper, for their reimbursement after the expiration of three months from the 25th of *September*, 1841, by public or private sale. And that in fact the Defendants, in pursuance of such power and authority, sold and disposed of such Company's paper, after the expiration of the period of three months, and before the commencement of the suit, for their reimbursement of the sum of Rs. 8,000 (the amount of the monies advanced as aforesaid, and of other principal monies advanced by the Defendants to *Macleod*, and interest thereon respectively, and then due), as they lawfully might, which was the detention of the last-mentioned Company's paper, in the first count complained of. Fourthly, the Defendants pleaded to the first count, that the three several Company's papers were transferable by endorsement, and that the Plaintiff endorsed them, and deposited and pledged them to and with the Defendants, as a security for the repayment of the sum of Rs. 25,000, then advanced by them to *Alexander Donald Macleod* at the Plaintiff's request, with interest, and of all other advances made, and to be made, by them to *Alexander Donald Macleod*, with interest, and with

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THE BANK OF BENGAL v. MACLEOD.

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Upon the reversal of the judgment of the Supreme Court at *Calcutta*, finding for the Plaintiff, this Court, in the circumstances of the constitution of the Supreme Court, directed a verdict to be entered for the Defendants, instead of awarding a *venire de novo*.

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1849.

THE BANK OF BENGAL v. MACLEOD.

power to sell the same by public or private sale, for their reimbursement, after three months from the 27th of *September*, 1841, and that in fact the papers were so sold and disposed of by the Defendants, before the commencement of the action, as they lawfully might be, for the sum then due and owing to them, to wit, Rs. 25,000, which was the detention complained of in the first count. And to the second and last counts, the Defendants pleaded *nunquam indebitatus*.

The Plaintiff in his replication joined issue on the last-mentioned plea, as well as on the first and second pleas to the first count. To the third plea to the first count, the Plaintiff replied, that he did not endorse in blank, and deliver the Company's paper in the third plea mentioned, to *A. D. Macleod*, in manner and form, &c., and upon this issue was joined. To the fourth plea to the first count, the Plaintiff replied, that he did not endorse and deposit, lodge and pledge, with the Defendants the three several Company's papers, in manner and form, &c., and upon this also issue was joined.

The cause was tried upon the 14th of *December*, 1846, before Sir *Lawrence Peel*, Chief Justice, and Sir *John Peter Grant* and Sir *Henry Wilmot Seton*, Puisne Judges, of the Supreme Court.

It appeared from the evidence at the trial, that the Plaintiff, *James William Macleod*, and *Alexander Donald Macleod* were brothers; that the Plaintiff had formerly resided in *Calcutta*, and had been a member of the firm of *Macleod, Fagan* & Co., and that he had left *India* previously to 1841; but that his brother, *A. D. Macleod*, was a partner in that firm; that the firm of *Macleod, Fagan* & Co. was a mercantile house esta-

blished in *Calcutta*, and carried on a species of business known in *Calcutta* as that of agents or agency business; such agents in *Calcutta* keeping the current accounts of individuals, and advancing monies on personal or other securities to them, and on their behalf, charging interest in account, and acting generally as such agents, in the manner and according to the rules and course of dealing of private bankers.

It appeared that in the year 1841, the Plaintiff sent from *England* the following power of attorney: "Know all men by these presents, that I, *James William Macleod*, at present of *Southampton*, do make, constitute, and appoint, *Alexander Donald Macleod*, and *Christopher Fagan*, carrying on business in *Calcutta*, as agents, under the firm of *Macleod, Fagan* & Co., to be my true and lawful attorneys and attorney, jointly, and each of them separately in their individual names, or in the name of the said firm, or of any other firm or firms which they or their associates or successors may adopt, for carrying on the said business, and on my behalf to sell, endorse, and assign, or to receive payment of the principal, according to the course of the Treasury, of all or any of the securities of the East India Company for shares in their public loans, payable from their Treasury at *Fort William*, in *Bengal*, to which I now am or may be lawfully entitled, and to receive the consideration money, and give a receipt or receipts for the same, and to do all lawful acts requisite for effecting the premises, hereby ratifying and confirming all that my said attorney and attorneys shall do therein, by virtue hereof. In witness whereof, I have hereunto set my hand and seal, this 3rd day of *August*, in the year of our Lord 1841."

On the 25th of *September*, 1841, *A. D. Macleod*

1849.

THE BANK OF BENGAL v. MACLEOD.

applied to the Bank of *Bengal*, for a loan upon his own account, and offered as a security Company's paper, No. 13,397, for Rs. 5,000. This note bore the following endorsement:—"Pay to *G. J. Gordon*, Esq., Sec. Union Bank, or order, *J. W. Macleod*, by his Attorney, *A. D. Macleod*." "Pay to *A. D. Macleod*, Attorney to *J. W. Macleod*, order, *G. J. Gordon*, Sec. Union Bank. *J. W. Macleod*, by his Attorney, *A. D. Macleod*."

It further appeared, that these notes were issued by and under the authority of the Governor-General and Council of the East India Company, in *Bengal*, for the purpose of raising money to meet the exigencies of the Government of India, and that they were negotiable instruments, the property in which passed by endorsement, and in *Bengal*, by delivery, like other promissory, or bank notes, and as the ordinary currency of the country.

The Secretary of the Bank, upon inspection of the note and the last endorsement, requested to see the power of attorney, which was shown to him, and it was thereupon registered at the Bank according to their usual course of business. The Bank at the same time took a further endorsement on the note from *A. D. Macleod*, in these words, "Pay to the Bank of *Bengal* or order, *A. D. Macleod*." The required loan was then made by the Bank in the ordinary course of business; and the note was taken as a security for the same, together with a memorandum of deposit signed by *A. D. Macleod*, and containing a power or authority from *A. D. Macleod* to sell the Company's paper on default by *A. D. Macleod*, in order to reimburse them their advances. The memorandum of deposit signed and delivered to the Bank by *A. D. Macleod*, by way

of collateral security, authorized the treasurer of the Bank absolutely to sell and dispose, three months after date, by public or private sale, the Company's paper, for the reimbursement to the Bank, as well of principal together with interest, paying to *Macleod* the surplus which might be forthcoming from such sale, he being bound to make good any deficiency after such sale.

Two days afterwards, *A. D. Macleod* applied to the Bank of *Bengal* for a further loan of Rs. 17,100 upon his own account, and the Bank advanced that sum to him, upon his depositing two other of the Company's papers, numbered respectively 11,914 and 13,612, as security for the repayment thereof, upon the statement made by *A. D. Macleod*, that the same were his own property. The Bank at the same time took an endorsement of *A. D. Macleod* on each of such Company's papers, and also another memorandum of deposit signed by him, and containing a power to sell the same, similar in terms to that given by him on the occasion of the first loan.

In *January*, 1842, on default made by *A. D. Macleod*, the three several Company's papers were sold, according to the usual course of business, and at the market-rate of the day, by the Bank, in pursuance of the powers contained in the memorandums of deposit, after the expiration of the prescribed time, in repayment of the respective loans.

Macleod, Fagan & Co. subsequently became insolvents.

The non-delivery of the Company's papers by the Defendants to the Plaintiff was relied upon as the detention in the first count alleged.

A verdict was found for the Plaintiff, the paper to

1849.

THE BANK OF BENGAL v. MACLEOD.

be calculated at Rs. 10. 8a. discount; viz. three notes, S. Rs. 5,000, S. Rs. 5,000, and S. Rs. 14,000.

On the 21st *December*, 1846, a rule was granted, on the motion of the counsel for the Defendants, to show cause, why the verdict entered for the Plaintiff in the action should not be set aside, and a nonsuit entered, or why a verdict should not be entered for the Defendants on the ground of misdirection, or why a new trial should not be granted on the ground of the verdict being contrary to evidence. This rule was argued before the full Court, and on the 2nd of *February*, 1847, the rule was discharged with costs. Judgment was delivered by the Chief Justice, who, after stating the nature of the action, and the pleadings, proceeded as follows:—

"The third plea alleges an endorsement from the Plaintiff to *A. D. Macleod*, of the note for S. R. 5,000, and a pledge by *A. D. Macleod*, of that note to the Bank. That endorsement is denied; there was no proof of any delivery, in fact, of this note by the Plaintiff, or any one, to *A. D. Macleod*, in the character of endorsee of that note; and unless it can be made out that the mere possession by an attorney under a power of the bill which he is authorised by that power to endorse in the name of his principal, proves, as soon as he has written a form of endorsement on the bill in the name of the principal, a delivery to him of the bill as an endorsee from his principal, the allegation is not proved: the mere writing the name of the principal is the act of the principal, done by a substituted, instead of by his own proper, hand. To constitute a transfer of a bill, endorsed in blank, there must be a delivery of it. In *Adams* v. *Jones* (4 Per. & Dav. 474), Lord *Denman* says, 'Now

a bill may be endorsed to a party in two ways, either by a special endorsement, making it payable to that party, or by a blank endorsement, and delivery to that party. In the latter way, at all events, if not in the former, the bill must be delivered to the party as endorsee, in order to constitute an endorsement to him. The continuing possession, under such circumstances, as are above supposed, of the attorney, is *primâ facie* referable to the original delivery to him, and unless some change of circumstances be shown, the character of the possession must be received as unvaried. The original delivery is in such cases the delivery of an unendorsed bill which the attorney has authority to endorse in the name of his principal. But the party taking such bill from him, the attorney, when endorsed in the name of the principal, must call for the power, or take the consequences of his neglect, as the principal will not be bound unless the authority conferred, be pursued. The endorsement being by procuration is notice to the transferee. In *Attwood* v. *Munnings* (7 B. & C. 284), Mr. Justice *Holroyd* says, 'The word procuration gave due notice to the Plaintiffs, and they were bound to ascertain, before they took the bill, that the acceptance was agreeable to the authority given.' *Littledale*, J., says:—'It is said that third persons are not bound to inquire into the making of a bill; but that it is not so when the acceptance appears to be by procuration; the question then turns upon the authority given.' That was the case of an acceptance by procuration, but the law is the same as to an endorsement, *Fearn* v. *Filica* (8 Scott's N. C. 241). In that case, *Tindal*, C. J., says:—'If *Grame* had endorsed the bill with his own hand, there can be no doubt but that would have been sufficient to pass the property

1849.

THE BANK OF BENGAL v. MACLEOD.

to a *bonâ fide* holder; but where the endorsement is made by a third party, the question is, whether the third party had authority to endorse, and that lets in the inquiry as to what was the authority given to *Lenegun.*' The same doctrine is applied to restrictive or conditional endorsements. See *Treuttel* v. *Barandon* (8 Taunt. 100), *Sigourney* v. *Lloyd* (8 B. & C. 622), and *Robertson* v. *Kensington* (4 Taunt. 30). In *Sigourney* v. *Lloyd*, Lord *Tenterden* thus expresses himself:—'The use of endorsements of this kind is not small, nor are they, as it seems to me, inconsistent with the interest and convenience of commerce. Such an endorsement will not prevent the endorsee from receiving the money from the acceptor when the bill becomes due. If he pay it to his principal, all will be well, but the endorsee must look to him for the application of it. It will have the effect of preventing a failing man from disposing of the bill before it becomes due, and from pledging it to relieve himself from his own debts at the expense of his correspondent. I cannot see that the interests of commerce will be prejudiced by our holding that such an endorsement is restrictive. On the contrary, I think that the interests of commerce will thereby be advanced. It is said, that it cannot be expected that bankers or others, when requested to discount such bills as this, should look into the accounts between the principal and his agent. I agree it cannot be expected they should; but still, if they take the bill so endorsed, they take it at their peril, and must be bound by the state of the accounts between those parties.' If the payee to whom, or to whose order, a bill were to be made payable, should write an endorsement in blank on the bill, and give the bill so endorsed to one for a special purpose, as

for instance to his servant, to put away, or for any other special purpose of the like kind, indicating an intention to retain the bill, and the servant should then transfer it for value, and without notice of the fraud, in fraud of his master's orders, the transferee would have a complete title to the bill, as the endorsee in law of the payee under such blank endorsement. See *Adams* v. *Jones* (4 Per. & Dav. 474), *Brind* v. *Hampshire* (1 Mee & Wel. 365), *Marston* v. *Allen* (8 Mee & Wel. 494); and though some doubt was thrown out in *Hayes* v. *Caulfield* (5 Q. B. Rep. 81), whether the whole doctrine laid down in the case of *Marston* v. *Allen* could be supported, no doubt was expressed on the general law that a mere delivery for a special purpose, inconsistent with a transfer, as for safe custody, for instance, does not constitute a transfer of a bill endorsed in blank, though it enables the actual possessor to transfer the bill to a *bonâ fide* holder for value, and without notice of the fraud, *à fortiori*, the mere continuing possession in the attorney without any delivery at all after the endorsement in blank, the endorsement in blank being unaccompanied by any change of possession, does not amount to nor evidence a transfer by delivery to such attorney, and any delivery to him in the character of attorney is a delivery to the principal. If the attorney duly executes his power, and delivers under the power to a transferee for value, his act binds the principal; it is in law the writing and delivery of the principal himself. If the writing and delivery are simultaneous, no doubt can exist in any mind that this is no delivery to the attorney: to hold it otherwise would be to establish an unmeaning fiction, dividing mentally one single act into two, one a real and one a fictitious act.

1849.

THE BANK OF BENGAL v. MACLEOD.

It is precisely the same thing if the attorney signs in anticipation of a subsequent intended transfer; therefore whilst the bill remains in his the attorney's hands, under circumstances not proving or tending to prove a transfer to himself, the transferee cannot establish as to such possession an allegation of an endorsement by the principal to the attorney. It was however argued, that the attorney, *A. D. Macleod*, might have sold this note to himself; that a sale to himself by an agent employed by a principal to sell, is good at law, though not supported in equity; that the Bank might have supposed this, and that the Court may presume or assume it. There was no proof whatever of the fact, nor does any ground exist for the assumption, and we entirely dissent from the position that such a transfer would be valid at law. The principle of law is a clear one, that an agent shall not by his own act give himself an interest at variance with his duty to his principal. By his sale to himself, he would unite in himself the inconsistent characters of seller and buyer. It was decided by Lord *Ellenborough* in *Wright* v. *Dannah* (2 Camp. 203), that one of the contracting parties could not even be the agent of the other for the purpose of signing the contract of purchase. In Exp. *Dyster* (1 Merr. 172), Lord *Eldon* treats it as a clear legal principle. The case was in Bankruptcy, a petition to prove a debt. Lord *Eldon* in that case, says:—'There is nothing in these proceedings which imports that he was actually a principal in those very dealings in which he was ostensibly concerned as a broker. If that fact were distinctly brought before me, I should have no hesitation in saying that no action could be maintained in respect of those transactions, inasmuch as they clearly amount

to a fraud.' And Lord *Wynford*, in delivering the judgment of the House of Lords in the case of *Rothschild* v. *Brookman* (5 Bli. N. R. 165), says :—'I take it to be a general principle of law and equity, that a man cannot be a seller for one and a buyer of that property himself.' He adds in conclusion of his judgment, 'I repeat, that Mr. *Rothschild* has only on this occasion followed a practice which I believe has been acted upon in *London*. It is fit your Lordships should now say such practices cannot be endured. If they are common, it is fit your Lordships should say in language that cannot be misunderstood, that such practices must not continue to prevail.' In the case of *Gillett* v. *Peppercorne* (3 Beav. 83), Lord *Langdale* expresses similar sentiments :—'It is said that this is every day's practice in the City. I certainly should be very sorry to have it proved to me that such a sort of dealing is usual; for nothing can be more open to the commission of fraud than transactions of this nature. Where a man employs another as his agent, it is on the faith that such agent will act in the matter purely and disinterestedly for the benefit of his employer, and assuredly not with the notion that the person whose assistance is required as agent, has himself, in the very transaction, an interest directly opposite to that of his principal. It frequently, I believe, happens that the same person is agent for both parties, in which case he holds an even hand, and acts, in one sense, as arbitrator between them ; but if a person employed as an agent, on account of his skill and knowledge, is to have, in the very same transaction, an interest directly opposite to that of his employer, it is evident that the relation between the parties then becomes of such a nature as must inevitably lead to continual disappoint-

1849.

THE BANK OF BENGAL v. MACLEOD.

ment, if not to the continued practice of fraud.' We entertain the same opinions as those expressed by Lord *Eldon*, Lord *Wynford*, and Lord *Langdale*. We have chosen to fortify our opinions by higher authority than our own. The condemnation of the practice, that an agent may purchase for himself goods which he is entrusted by his principal to sell, applies strongly to the case of an agent in this country, for an absent principal in *England*, entrusting him with his property for sale. It is obviously the interest of the agent, if he may purchase, to purchase at a time when it would not be for the interest of the principal to sell; the distance and want of power of supervision in the principal would leave him much exposed to the commission of frauds if an agent, so contracted to sell, could purchase for himself. The language of the power in question is inconsistent with the notion that any such power was intended to be conferred; no presumption can arise of a purchase which could not have been supported, and no evidence raises any presumption that such a purchase in fact ever took place. It appears to us, therefore, that there is nothing to show that any endorsement was made by the Plaintiff of this note to *A. D. Macleod*, and that issue was properly found for the Plaintiff, on the issue raised on the plea, of not possessed. The question is the same as to all the notes. A question was made, whether in detinue, a lien in the Defendants could be proved under this plea. It is a matter not settled, but we are of opinion that this defence, in this action, is admissible. It is a question as between the Plaintiff and Defendants, not of lien, but of property. The suit relates to negotiable securities, and the effect of a transfer, *bonâ fide*, and for value of such securities,

transferable by delivery, is to transfer property though the actual transferrer have none. It is true that it would be subject to redemption, if the transfer were in fact a pledge, but there would not be an absolute and also a special property in the notes created by the transfer so as to render it necessary to plead a lien. The Plaintiff proved his title, by proving that all three were made payable to him, or his order. It then lay on the Defendants to show that the property was divested as against him at least. The actual transfer to the Defendants was on a pledge to them by *A. D. Macleod* for his own private debt, which pledge, the registered power, which applies to this note for S. R. 5,000, clearly did not authorize, nor is it possible to presume that the lost power (*a*) contained any such authority. It was said, that a factor or agent might pledge the bills of his principal for his own debt, for that he could pledge such bills, though he could not at Common Law pledge the goods of his principal, under a mere power of sale. The reason, however, of the distinction was not adverted to: it turns on difference in the nature of the property, not on any difference in the nature of the authority. A power of attorney is construed strictly; whether it relate to goods or bills, the intention governs, and a man who gives a power authorising a sale of his bills, or other negotiable securities, for his own purposes, certainly does not intend to confer, and does not confer, on the agent, thereby, the power to pledge the securities for the private debt of the agent; and as long as such securities require an endorsement in the name of the principal, no such power of pledging exists, or can take

(*a*) Admissions were made on the trial as to this power of attorney.

1849.
THE BANK OF BENGAL v. MACLEOD.

place, to the prejudice of the donor of the power, the owner of the unendorsed securities, nor can the attorney, by merely writing the form of an endorsement, in the name of the principal, on the securities, give himself such a power, or additional security to his transferee, for such transferee must call for the power, and will take, subject to its due execution, and no subsequent endorsee or transferee would be in a better position than the first. It would be wholly immaterial as against the payee, how many names were subsequently put on the paper, either through a connected and unbroken chain of endorsements in full, or after an endorsement in blank; the legal interest in the bill would still remain in the payee, for no endorsement authorized by him would have taken place. See *Fearn* v. *Filica* (8 Scott's N. R. 241), and *Robertson* v. *Kensington*, before quoted. It is true that in *Fearn* v. *Filica*, there was no authority at all to endorse a bill of the particular description; but the principle is a general one, that when an acceptance, or the drawing, or endorsing, of a bill is not by the proper hand of the acceptor, drawer, or endorser, but made by another, in his name, the question is always, whether that other had authority to do the act; and the judgment of the Chief Justice *Tindal*, before quoted, asserts the general principle. It resembles the case of a conditional endorsement. *Robertson* v. *Kensington*. The subsequent endorsees have their remedy against prior intermediate endorsees: but as between the payee and an endorsee, when the first endorsement is by procuration, the case turns on the due execution of the power. If the case of *Collins* v. *Martin* (1 Bos. & Pull. 648), be examined, the judgment of *Eyre*, C. J., will be found fully to support the doctrine, that the power of an

agent, of pledging his principal's bills in satisfaction of his own private debt, turns wholly on the nature of the property. Bills specially endorsed to the agent; bills payable to order, and endorsed in blank; bills originally made payable to bearer; all these he may transfer, as his own act, and if he pledge them for his own purposes, and the lender be not cognisant of the fraud, he is secure—the reason is, because, the nature of the property is such, that the bill, under such circumstances, is deemed the property of the agent conclusively for the purposes of transfer to a *bonâ fide* transferee; but in unendorsed bills made payable to the principal or order, the property is in the principal, though the possession be transferred to the agent, and the power in such a case is a naked authority which must be strictly pursued. It is unnecessary to say anything as to a pledge of bills for the owner's use, under a power of sale, a pledge for the agent's use, is clearly unauthorised. But the Defendants urge there was an endorsement in blank on the notes in the name of the principal, and so the notes became payable to bearer. It is admitted, that such endorsements were made in fact, and that an endorsement in the name of the principal was authorised for some purpose: no more is admitted, and nothing was proved, as to the transactions with the Union Bank, or any other parties, except the Bank of *Bengal*. No power was proved, which authorised a pledge for *A. D. Macleod's* own purposes, none such can be presumed. The lost power is admitted to have justified a transfer by a blank endorsement, in the name of the principal, but it is not admitted, nor proved, under what sort of a power, whether general or limited, the transfers apparent on the notes. took place, nor under what circumstances,

1849.

THE BANK OF BENGAL v. MACLEOD.

whether they were in execution, or in abuse, of the power. There was proof of a limited power subsequently given, and no proof of any necessity for one more general. We can make no intendment in this case, against the payee, of any due execution of any power by his attorney, *A. D. Macleod*; the Plaintiff stands on his own right as payee: if his attorney have transferred the notes, it is for the Defendants, who assert that such is the case, to prove it. The Plaintiff, the principal, whose case is, that he is the payee of the notes, is not bound to call the attorney or other person to prove that a fraud has been committed on the Plaintiff. It lies on those who rest on the authority, to show affirmatively, the authority and its due execution: they show that the Plaintiff gave a power to the attorney, which authorised the attorney to endorse the notes in the Plaintiff's name, for some purpose which is not disclosed, for they gave no evidence of the object for which the lost power was given, nor showed that such proof was unattainable. It does not appear that the Defendants could not have proved the nature of the power and the nature of the transactions with the first *de facto* endorsee, and we are unable to collect from any facts proved, or admitted, that any due exercise of any power ever took place. It was said, that his due execution of the power must be presumed, as an abuse of his trust would be the imputation of a criminal act, the power, it was said, being an instruction in writing, to the agent. We think, however, that assuming the Statute to apply, an excess of such power is not necessarily a criminal act under the Statute. We see no limit to the application of such presumptions if this be inadmissible. It might be urged that a disputed handwriting must, *primâ facie*,

be treated as genuine, since signing a name to an instrument without authority is unexplained, *primâ facie*, evidence of a false making, and in all cases of agency, the *onus* of proof would be shifted, and it appears from the act itself that no such consequences were intended to result. See 9th *Geo.* IV., c. 74, s. 105. We think, therefore, that no blank endorsement was proved in this case, divesting the property of the payee. Let it be assumed, however, that such proof was made, still there was proof of the property in the notes being subsequently in the Plaintiff, and no proof that it was again divested; but notwithstanding that circumstance, a transfer by *A. D. Macleod* to the Bank, *bonâ fide*, of the notes, if endorsed in blank, would transfer the property to the Bank. It becomes, therefore, necessary, on the assumption that an effective endorsement in blank in the name of the principal, was proved, to consider, whether the Bank can be viewed as *bonâ fide* holders. They had notice of circumstances including the state of the notes themselves, which, in our opinion, made it their duty to inquire as to the mode in which *A. D. Macleod* made out his asserted property in the notes. They made no inquiries whatever, whether the registered power was intended to embrace the other notes that he pledged to the Bank as well as the latter. They knew that it applied to the latter, pledged to them but two days before, and *A. D. Macleod's* production of it, in reference to that note on their demand for a power, admitted of no other construction. It might not be necessary to endorse the note under it, if a good execution of the former power had once taken place as to that note. But the case does not depend as to the point of *bonâ fides* or the necessity as to any of

1849.

THE BANK OF BENGAL v. MACLEOD.

the notes of a transfer, under the power which was registered, but on the notice of the Plaintiff's interest in the notes, which the transmission and acceptance of that power, together with all the circumstances of the case, conveyed. They knew also of *A. D. Macleod's* connection with the house of *Macleod, Fagan* & Co., who appeared as endorsers on the notes. No inquiry whatever was made, how that firm, or *A. D. Macleod*, had acquired any interest in any of the notes. A sale by *A. D. Macleod* to his firm would be equally prohibited with a sale to himself. The transaction of the deposits was close upon the transmission of the power. On the deposit of the notes numbered, no power whatever was called for, though the first endorsement was by procuration. It was not proved that the lost power was then lost, or that its contents, if it were then lost, could not be learnt. It appears on the notes themselves, that there had been transactions with the Union Bank; no inquiries were made of *A. D. Macleod*, or at that Bank, into their nature. That the agent had himself purchased, or that his house had purchased through him, the notes in question, from the Plaintiff, is an inadmissible assumption, and the Bank required no proof whatever, in support of the assertion made by *A. D. Macleod*, that he was the owner of the notes. It was urged that the words 'Atty. for *A. D. Macleod*,' were merely a *descriptio personæ*. It would, however, have been not merely an unmeaning, but an untrue description, injurious to the interest of *A. D. Macleod* himself, if he had been the owner of the notes. We think, that the conduct of the Bank, in not calling for inquiry, under circumstances, which, in our opinion, so loudly demanded it, prevents them from being viewed as *bonâ fide* trans-

ferees for value; and we found this opinion, not on the exploded ground of carelessness or want of prudence, whether in a greater of less degree. If we were to support this transaction, we should establish, as a consequence resulting from our decision, this position, that an attorney for an absent principal entrusted with the Government paper of his principal, payable to that principal or owner, and unendorsed by such principal, has only to write a form of endorsement by procuration in his principal's name on the back of the security, and then he will be able to raise money on it for any purposes of his own, if he will but assert the property to be in himself. We should decide, in effect, that a fiction of some transfer to the attorney is to be adopted, and that a power is to be viewed as in the nature of proprietary right; such a decision would be opposed to the principles of law and to the uninterrupted current of decisions, and it would tend to encourage breaches of trust; such a decision could not tend to promote the true interests of commerce, which depends so much on the due performance of fiduciary engagements. The interests of depositors must be considered as well as the interests of those to whom depositaries may resort for aid when needing pecuniary advances. We think, that one who forbears to inquire, under such circumstances as the present, resting on a bare statement of an agent needing an advance, that the property is his, whilst all the circumstances point to an opposite conclusion, must stand or fall by the truth or falsehood of that statement. It is his duty to inquire where the interests of third parties are apparent, and the absence of inquiry would facilitate frauds; and if he do not make that inquiry, because he thinks that the law does not de-

1849.

THE BANK OF BENGAL v. MACLEOD.

mand it of him, he must take the consequences of his error."

From this judgment the present appeal was brought, which now came on for hearing.

Mr. *Greenwood*, Q. C., and Mr. *Leith*, for the Appellants.

The notes came into the possession of the Appellants in the ordinary course of their business, as bankers. The endorsement by *A. D. Macleod*, as attorney for the Respondent, and delivery to the Bank of the notes so endorsed, for value received, constituted in law, a valid assignment and transfer. The Bank had no right or reason to suspect fraud on the part of *A. D. Macleod*; he brought the notes endorsed. It was proved in the cause, that he was empowered by the Respondent to endorse and negotiate the notes. What inquiries, therefore, could the Bank make? Endorsed bills in the hands of a banker are negotiable instruments. *Collins* v. *Martin* (*a*), *Bolton* v. *Puller* (*b*), *Brandao* v. *Barnett* (*c*). The question will turn upon the power conferred on *A. D. Macleod*. A person who has power to sell goods, we admit, cannot pledge them. A distinction, however, exists between goods and negotiable instruments. *Wookey* v. *Pole* (*d*). Mr. Justice *Bayley*, in that case, lays down the rule, as follows (*e*):—"A pawnee of goods or chattels, or a vendee out of market overt, has in general no better title than his pawner or vendor, and cannot resist the claim of the rightful owner; but bank notes and bills

(*a*) 1 Bos & Pul. 648. (*b*) 1 Bos. & Pul. 539.
(*c*) 12 Clk. & Fin. 787. S. C. 6 Man & Gr. 630.
(*d*) 4 Bar. & Ald. 1. (*e*) 4 Bar. & Ald. 15.

of exchange stand on a different footing in this respect from ordinary goods and chattels. The holder, *bonâ fide*, and for a valuable consideration, of a bank note or bill of exchange, has a good title against all the world; because, in the case of bank notes, they are considered as money, and pass as such, and it is essential for the purposes of trade, that delivery should give a perfect title, and because in the case of bills of exchange, this is the law and custom of merchants, and it makes no difference in the case of bank notes or bills of exchange, whether such holder has received them as pawnee or otherwise;" and he cites, in support of this, the case of *Collins* v. *Martin*. Here the Bank were *bonâ fide* holders, for value, of the notes, and their title ought not to be invalidated by any misapplication of the same by *A. D. Macleod*. The authorities referred to by Sir *Lawrence Peel*, as to bills wrongly endorsed, do not warrant the judgment of the Court. In *Fearn* v. *Filica* (*a*) the question was, whether the endorser had authority to endorse; and to the same effect are the cases of *Adams* v *Jones* (*b*), *Robinson* v. *Little* (*c*), *Robertson* v. *Kensington* (*d*), *Attwood* v. *Munnings* (*e*), *Sigourney* v. *Lloyd* (*f*), and *Goodman* v. *Harvey* (*g*). The cases of *Edie* v. *The East India Company* (*h*), Ex parte *Twogood* (*i*), *Walker* v. *M'Donnell* (*j*), *Smith* v. *Clarke* (*k*). *Smith's* Mercantile Law, pp. 209-10 (4th Edit.), are strongly in our favour.

(*a*) 8 Scott's N. R. 241. (*b*) 12 Ad. & Ell. 455. 4 Per. & D 474.
(*c*) 9 Q. B. Rep. 602. (*d*) 4 Taunt. 30.
(*e*) 7 Bar. & Cr. 278. (*f*) 8 Bar & Cr. 622.
(*g*) 4 Ad. & Ell 870. (*h*) 2 Burr. 1216.
(*i*) 19 Ves. 229. (*j*) 11 Law Times, 270.
(*k*) Peake 225. 1 Esp. 180.

1849.

THE BANK OF BENGAL v. MACLEOD.

The third issue was, whether the Respondent did, in fact, endorse the notes. The Court below held, that a party could not endorse to himself, as there could not be an endorsement without delivery, any more than he could sell to himself; and, therefore, that in fact he had not endorsed the notes This is not law, as no delivery was requisite to complete the assignment. It was formerly thought by the Court of Exchequer, in *Marston* v. *Allen* (*a*), that delivery must be proved; but that case has been since overruled. *Hayes* v. *Caulfield* (*b*), and *Brind* v. *Hampshire* (*c*).

There is also another objection, upon which, we submit, the Plaintiff ought to have been nonsuited, as it goes to the root of his title. Detinue was not the proper form of action, and will not lie in a case like this. *Buller's* Nisi Prius, tit. "Detinue," p. 48-9. *A. D Macleod* deposited the notes in 1841, and the Bank sold them in 1842: the action was brought in 1846, at which time the Respondent had no right of possession.

Mr. *Peacock*, Q. C., for the Respondent.

Upon the argument of the Appellants, and the judgment of the Court below, two questions arise · First, whether the endorsement was a blank endorsement; and secondly, whether there had been any negligence on the part of the Bank. I do not dispute the principle laid down in *Foster* v. *Pearson* (*d*), that a person taking Bills of Exchange *bonâ fide* for value, has a good title, though he take them without care or caution, except so far as the want of such care and cau-

(*a*) 8 Mee & Wel 494 (*b*) 5 Q B Rep 81
(*c*) 1 Mee & Wel 365 (*d*) 1 C. M. & R 849

tion may affect the *bonâ fides* of the transaction. The question is, whether, when the notes were in the hands of *A. D Macleod*, they were negotiable by bearer. If the notes had been payable to bearer, I should not deny that they were negotiable; but on the face of the notes it appears they were payable to *James W Macleod's* order, and certainly he never endorsed them in blank. The third point raised by the issue, is, did the Respondent put a general endorsement on the notes. That must depend entirely on the power given to *A D. Macleod* by his principal; which is, to "sell, endorse and assign," or to receive payment. If, therefore, *A. D. Macleod* had no power to do what he has done, the endorsement was necessarily void. The endorsement mentioned in the power of attorney was for the purpose of authorising him, as agent for the purposes of a sale, and it is clear law, that a power to sell does not give a power to pledge. *De Bouchout* v. *Goldsmid* (*a*). When a bill is offered for sale, it is incumbent on the party taking it, to inquire the authority for its transfer, and that disposes of the cases cited by the Appellants. In *Collins* v. *Martin* (*b*), and *Brandao* v. *Barnett* (*c*), the bills were payable to bearer. The taker of a bill from an agent must ascertain the authority of the agent, he must look at the power as much as if it was part of the bill, and must see that the agent does not act beyond his authority, as, if the agent does so, his acts are void. *Attwood* v. *Munnings* (*d*). Here the Bank took the word of *A. D. Macleod* only, that the notes were his own, and made him endorse them, making him also personally liable. *Adams* v. *Jones* (*e*). The note was then endorsed, but

(*a*) 5 Ves 211
(*b*) 1 Bos. & Pul 648.
(*c*) 12 Clk & Fin 787.
(*d*) 7 Bar & Cr. 278.
(*e*) 4 Per & D 474

1849.

THE BANK OF BENGAL v. MACLEOD.

not delivered for the purpose of passing it. Endorsement is *primâ facie* proof of delivery, but the delivery may be rebutted. *Robertson* v. *Kensington* (*a*). It is, however, said, that *A. D. Macleod* endorsed to himself, that he was both agent and endorsee, and that it must be presumed that he got the note back as a *bonâ fide* owner; but it is evident, that he had it merely as an agent, and in that case the Bank were bound to make proper inquiries, and in not doing so they were guilty of gross negligence. *Crook* v. *Jadis* (*b*), *Backhouse* v. *Harrison* (*c*), *Foster* v. *Pearson* (*d*), *Haynes* v. *Foster* (*e*), *Alexander* v. *M'Kenzie* (*f*).

There is another objection, now urged for the first time, that detinue will not lie. Such objection cannot be entertained at the present stage of the appeal, it should, if tenable, have been urged in the Court below, it is now too late.—[Lord *Brougham*: This is a point purely technical, and if not taken in the Court below, cannot be taken here.—Mr. *Greenwood*: The point was taken by the second plea, that the Plaintiff had not sufficient interest to support the action.]—Detinue was the proper form of action. *Comyn's* Dig., tit. "Detinue," 20. *Williams* v. *Archer* (*g*), where all the cases are collected.

Mr. *Greenwood*, in reply.

Their Lordships reserved judgment until the following appeal, which arose out of similar circumstances, was argued, when they delivered a joint judgment in both appeals (*h*).

(*a*) 4 Taunt. 30.
(*b*) 5 Bar. & Ad. 909.
(*c*) 5 Bar. & Ad. 1098.
(*d*) 1 C. M. & R. 849.
(*e*) 2 Crom. & Mee. 237.
(*f*) 18 Law Journal, N. S. 94.
(*g*) 5 Com. Ben. Rep. 318.
(*h*) See *post*, p 37

THE BANK OF BENGAL - - - *Appellants*,

AND

CHRISTOPHER GEORGE FAGAN - *Respondent*.*

On Appeal from the Supreme Court at Fort William in Bengal.

7th July, 1849.

For marginal note, see the case of the *Bank of Bengal* v. *Macleod*, *ante*, p. 1.

THIS case, involving a similar question to the preceding appeal, was an action of trover brought by the Respondent against the Appellants, the Bank of *Bengal*, upon the conversion of eight promissory notes, or securities for the payment of money, by the Governor-General of India in Council. The plaint contained one count, which charged the Defendants with the conversion of the eight promissory notes or securities of the 4 per cent. loan, commonly called Company's paper. The Defendants pleaded, first, not guilty; and, secondly, that the Plaintiff was not possessed of the notes of his own property. Upon these pleas issues were joined.

The cause came on for trial, on the 19th of *November*, 1847, before Sir *Lawrence Peel*, Chief Justice, and Sir *John Peter Grant*, and Sir *Henry Wilmot Seton*, Puisne Judges of the Supreme Court.

The circumstances which distinguished this case from the last, and which appeared in evidence on the trial, were these:—

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillor,—*Assessor*,—The Right Hon. Sir Edward Ryan.

1849.

THE BANK OF BENGAL v. FAGAN.

On the 4th of *November*, 1841, the Respondent, an officer on the *Bengal* Establishment, drew upon his bankers and agents, *Macleod, Fagan* & Co., at *Calcutta*, in favour of one *Tuttle Charles*, for Rs. 6,000, payable at ten days after sight. The draft was presented for acceptance to *Macleod, Fagan* & Co., on the 9th of *November*, 1841. In the meantime, on the 6th of *November*, the Respondent forwarded a *hoondee* for Rs. 2,000, endorsed to *Macleod, Fagan* & Co., at the same time informing them of his draft for Rs. 6,000. The state of the account between the Respondent, and *Macleod, Fagan* & Co., if made up on the 9th of *November*, would have shown a balance of 6 annas, 8 pie, due from the Respondent to them. Upon the presentation of the Respondent's draft for Rs. 6,000, *Macleod, Fagan* & Co., wrote to the Respondent, and intimated to him that they had no available funds belonging to him in their hands to meet the draft. The Respondent then agreed to give them a power of attorney, upon which they accepted his draft for Rs. 6,000.

The power of attorney executed by the Respondent, and sent to *Macleod, Fagan* & Co., was precisely in the same form, as the power of attorney executed by *Macleod*, and set out in the preceding case (*a*).

On the 24th of *November*, *A. D. Macleod*, one of the partners in the firm of *Macleod, Fagan* & Co., endorsed and delivered to the Appellants a Company's note for the sum of S. Rs. 8,500, payable to the Respondent, his executors or administrators, or his or their order, and bearing interest at four per cent. This paper was endorsed "*A. D. Macleod*, attorney, for Lieut. *C. G. Fagan*. Pay to the Bank of *Bengal*,

(*a*) *Ante*, p. 5.

or order.—*A. D. Macleod.*" The Appellants paid the sum of 7,600 Company's rupees to *Macleod*, who, at the same time, signed and gave to the Appellants his promissory note of that date, payable at three months, for the sum of Rs. 7,600, and interest. In this note, it was expressed that the Company's note for S. Rs. 8,500 was deposited with the Appellants, as a collateral security for the repayment, as well of the Rs. 7,600 and interest, as of any sums which had been or might be advanced or paid to *Macleod* by the Appellants, and in default of payment the Bank was authorised to sell the Company's paper, and reimburse itself, paying *Macleod* the surplus, which might be forthcoming from such sale; and he making good the deficiency, if any. On the same day, *Macleod, Fagan* & Co., paid the Respondent's draft for Rs. 6,000.

On the 7th of *December*, 1841, *Macleod, Fagan* & Co. endorsed and delivered to the Appellants seven other Company's notes, of two of which the Respondent was the original payee, and of the others endorsee, for sums amounting altogether to Rs. 5,800. These notes were endorsed as follows:—" *C. G. Fagan*, by his attornies, *Macleod, Fagan* & Co. Pay to the Bank of *Bengal*, or order.—*Macleod, Fagan* & Co." And the Appellants, upon receiving the Company's notes, paid to *Macleod, Fagan* & Co., Rs. 5,000, taking also the promissory note of *Macleod, Fagan* & Co., at three months' date, for such sum and interest, which promissory note was expressed in terms similar to those used in the note given on the 24th of *November*, by *A. D. Macleod*, that the seven Company's notes had been deposited as collateral security for repayment of Rs. 5,000, and interest, and of all sums which

1849.

THE BANK OF BENGAL v. FAGAN.

had been, or might be, advanced or paid to *Macleod, Fagan* & Co., by the Appellants.

Default having been made in payment, the Bank of *Bengal* sold the several notes, so delivered to them, in *February* and *March*, 1842, and realized the amount.

Macleod, Fagan & Co., became insolvent, and on the 16th of *May*, 1844, an account was rendered to the Respondent by the assignee of the Insolvent Court, at *Calcutta*, in whom the estate of *Macleod, Fagan* & Co., had become vested. The Respondent corresponded with the official assignee on the subject of the estate of *Macleod, Fagan* & Co., and received a dividend on the balance due to him upon his account with that firm, in which the proceeds of the Company's notes in question were included.

Upon this evidence, a verdict was found for the Respondent, with Rs. 12,908. 2. 5. damages. On the 23rd of *November*, a rule was granted upon a motion on behalf of the Appellants, pursuant to leave reserved at the trial, calling upon the Respondent to show cause why the verdict entered for the Respondent should not be set aside, and a verdict be entered for the Respondent on the issue taken on the first plea, and for the Appellants on the issue taken on the second plea, or why a nonsuit should not be entered.

On the 13th of *January*, 1848, after argument, the Court discharged the rule, with costs. Sir *Lawrence Peel*, Chief Justice, delivered the judgment of the Court as follows:—

"This case is, in our opinion, undistinguishable in principle from that of *Macleod* v. *The Bank of Bengal*. Both are founded on authorities which, if they are not to be followed, must be overruled by a higher

tribunal than this Court. The grounds upon which it is sought to distinguish the present case, appear to us to be untenable. We think there was no recognition. The evidence does not show a sale in fact by *Macleod, Fagan* & Co., to themselves, supposing such a sale to have been legally valid. We view this sale as a mere fiction; it is ingeniously introduced to support an argument which would otherwise rest on no foundation. The evidence shows, that the Plaintiff was subsequently informed of a sale, but it does not show that he knew the real circumstances; and there is no evidence of any sale except that by the Bank of *Bengal*, which is not the sale which the argument treats as recognised: but an imaginary sale by *Macleod, Fagan* & Co., for the Plaintiff, to themselves, is the subject of the supposed recognition. It is said that *Macleod, Fagan* & Co., had a lien, and that they transferred that lien to the Bank of *Bengal*. *Macleod, Fagan* & Co., undoubtedly had a lien; but if the nature of it be considered, the consequence to the Plaintiff's success in this action, which it is sought to deduce, will not follow. The Bank of *Bengal* sold these securities. This act could be supported under the power of attorney alone. For the paper was specially endorsed to the Plaintiff, and has been by him unendorsed, unless the power has been executed. ' If Bills of Exchange are drawn, payable to the order of A., and A. pays them into his Banker's hands without endorsing them, it is obvious, that though A. may become subsequently indebted to his Banker, and his Banker may have a lien on those bills, that this lien does not operate to transfer a property in such bills, and is only an equitable interest. The debts which they secure and evidence, are transferable by the

1849.

THE BANK OF BENGAL v. FAGAN.

custom of Merchants, but transferable by the custom in such a case by endorsement only, not by delivery without endorsement; the bills not being in a state that the property in them can pass by delivery. *Collins* v. *Martin*, (1 Bos. & Pul. 648,) will, if it be attentively examined, show that it is the nature of the property in bills, which enlarges the power of alienation over that which exists as to mere chattels. Without a valid endorsement, no property in these specially endorsed securities could be transferred to the Bank, so as to prevent their sale from operating as a conversion; and by a conversion their lien would for any defensive purposes in this action be destroyed. The question is, therefore, simply this: was the power exercised or abused? We think upon the evidence, that it was grossly abused. If such an exercise of a power could be supported, then a lien might be enlarged to the prejudice of the owner by the fraud of the agent. It is, therefore, in our opinion, clear, that the Bank of *Bengal* could not be in a better position than *Macleod, Fagan* & Co., against the Plaintiff. They, *Macleod, Fagan* & Co., could sell the Plaintiff's paper and confer property in it, if they followed the authority conferred: that authority, if the correspondence and the power be looked at, was not to pledge the paper, still less to pledge it to another for their own advantage. The sale by the Bank was unauthorised, since the pledge to the Bank was an unauthorised pledge. The real contract between the Bank of *Bengal*, and *Macleod, Fagan* & Co., was not a contract that the latter should transfer their lien, but it was a totally different contract: and it cannot be viewed now otherwise, because it is found to be unsupportable as it really was. What ground there is for assuming a

sale by *Macleod, Fagan* & Co., to themselves is best tested by this; whether on this evidence, if they had retained the paper and it had risen in value, and the Plaintiff tendering to them the amount of their advances had claimed to have his paper back, they could have said: 'Look at these endorsements made by us as your attorneys: the property is ours: we have sold to ourselves, and we will take advantage of the rise in the value.' The Plaintiff is, in our opinion, entitled to retain his verdict. It is not in discussion, under this rule, whether the verdict should stand for the full amount of the damages, or for that sum reduced by the amount of *Macleod, Fagan* & Co.'s lien against the Plaintiff. The Defendant has not availed himself of the leave offered him at the trial, to move to reduce the damages, as we understand, because that reduction might prejudice his right of appeal. Upon that point, therefore, we express no opinion. If this case be appealed, and our decision be sustained on the main question, then if the Defendant is entitled at law to a reduction of the damages to the extent of the lien of *Macleod, Fagan* & Co., against the Plaintiff, the evidence furnishes the means of making that reduction, if the verdict not questioned now on this point can be appealed against on that ground. The Plaintiff, if he be legally entitled to retain his full damages, is certainly a trustee for the surplus; whether for the Bank of *Bengal* or for the creditors of *Macleod, Fagan* & Co., it is not necessary for us to decide. A mere equitable lien could not, we apprehend, furnish ground for a reduction of damages in an action at law; and whether the lien of *Macleod, Fagan* & Co, be treated as merely a common law lien on a chattel, or as a lien on a negotiable instrument,

1849.

THE BANK OF BENGAL v. FAGAN.

needing endorsement, and unendorsed, still the lien of their transferee, the Bank, would be but equitable, if the power of attorney was not duly exercised. A lien on a mere chattel, is not at common law transferable, *Legg* v. *Evans* (6 Mee. & Wel. 42), and the case is not within the Factor Act. That the transfer for a valuable consideration of an unendorsed bill or note, payable to order, confers only an equitable right, *Watkins* v. *Maule* (2 Jac. & Wal. 243)."

Judgment was afterwards signed for the amount of such damages and costs.

From this judgment, the Bank of *Bengal* appealed to Her Majesty in Council, and the case came on for hearing at the same time as the appeal of "*The Bank of Bengal* v. *Macleod*"(a).

Sir *Frederick Thesiger*, Q. C., Mr. *Greenwood*, Q. C., and Mr. *Hure*, for the Appellants.

The notes in question were negotiable instruments, and came into the hands of the Appellants, in the course of their business as Bankers. *Macleod*, *Fagan* & Co., were the agents at *Calcutta* of the Respondent, to whom they had advanced money, on the securities of those very notes, and he in return empowered them to endorse the notes; which they did, for value received, to the Appellants. The Appellants have nothing to do with the alleged fraud of *Macleod*, *Fagan* & Co., in pledging the notes; they could have no reasonable grounds for suspecting that they were improperly dealing with the notes. The question really turns upon this, whether the power was properly exercised by them. The form of the power

(a) *Ante*, p. 1.

of attorney granted by the Respondent to *Macleod, Fagan* & Co., is to "sell, endorse and assign," and may, therefore, be read distributively or conjunctively, as you please. *Baldwin's Case* (*a*). The Bank were authorised by law in selling. In *Stierneld* v. *Holden* (*b*) the pledgee sold, and it was held, that he could not be sued in trover for bills of lading. Every deed is to be taken most strongly against the grantor. He cannot defeat his own grant. *Comyn's* Dig., tit. "Grant," E. 14. But it is said that the power to endorse is auxiliary only: that is not so; it is the real object of the power. In *Murray* v. *The East India Company* (*c*), and *Fenn* v. *Harrison* (*d*), there was no authority given by the power to endorse; those cases, therefore, are distinguishable from the present. Exparte *Twogood* (*e*), Exparte *Pease* (*f*), and *De Bouchout* v. *Goldsmid* (*g*), are to the same effect.

Mr. Serjeant *Byles*, Mr. *Peacock*, Q. C., and Mr. *Maude*, for the Respondent.

The power of attorney given to *Macleod, Fagan* & Co., was for the purpose of enabling them to deal with the notes as agents for the benefit of the Respondent, it did not give them any authority to pledge the notes; their pledging or assigning them to the Appellants was, therefore, a fraud upon the Respondent. An unauthorised endorsement conveys no more title than a forgery, and the question is, whether this endorsement entirely converted the note into a bill payable to bearer, and if so, was it authorised? Powers

(*a*) Leon. 74.
(*b*) 4 Bar & Cr. 5.
(*c*) 5 Bar. & Ald. 204.
(*d*) 3 Term. 757. 4 Term. 177.
(*e*) 19 Ves. 229.
(*f*) 19 Ves. 25.
(*g*) 5 Ves. 211.

1849.

THE BANK OF BENGAL v. FAGAN.

of attorney are to be construed and limited to their expressed particular object. *Chitty*, "On Bills of Exchange," p. 29 (9th. Edit.). In this case there is no power given to pledge. The authority is "to sell, endorse and assign." It is admitted that the notes were pledged for the personal use of *Macleod, Fagan* & Co., at less than their value, and that the agent also gave his promissory note to the Bank. An agent cannot deal for himself at law or in equity. *Farebrother* v. *Simmons* (*a*), *Brookman* v. *Rothschild* (*b*), *Marshall* v. *Kinner* (*c*). If the word "endorse" had been the only word, he could have sold; but we submit that the word "endorse" is controlled by the context, and these words must be taken collectively, and that the Appellants wholly failed in making out any defence to the action. There was quite sufficient grounds to induce the Bank to suspect that *Macleod, Fagan* & Co., were dealing improperly with the notes. They also referred to *Watkins* v. *Maule* (*d*), *Queiroz* v. *Trueman* (*e*), *Stierneld* v. *Holden* (*f*), *Shipley* v. *Kymer* (*g*), *Kuckein* v. *Wilson* (*h*).

Mr. *Greenwood*, in reply.

The power "to sell, endorse and assign" is general. The Bank of *Bengal* had no reason to suspect fraud on the part of *Macleod, Fagan* & Co., if indeed, there was any. It was perfectly reasonable to suppose, that as the balance was against *Fagan*, and he wanted money, he wished to raise money by pledging the notes.

(*a*) 5 Bar & Ald. 333.
(*b*) 3 Sim. 153. S C. 5 Bli. N. S. 165.
(*c*) 1 Stark. 499.
(*d*) 2 Jac. & Wal 237.
(*e*) 3 Bar. & Cr. 342.
(*f*) 4 Bar. & Cr. 5.
(*g*) 1 Mau. & Sel. 484.
(*h*) 4 Bar. & Ald. 443.

It might be imprudent at that time to sell them, when the money could be raised by pledging.

On the 19th of *July*, 1849, judgment was delivered in this appeal, and also in the preceding case of "*The Bank of Bengal* v. *Macleod*" (*a*), as follows, by

Lord BROUGHAM:

19th July, 1849.

Both these cases involve the same question, and depend mainly on the decision of that question. If it be determined in the Appellants' favour, in the first appeal, they are both decided for them; if that be given against them, special circumstances, peculiar to the second appeal, require to be considered.

That question relates to the authority which the house of *Macleod* & Co., agents of *James William Macleod*, in the one case, and of Captain *Fagan*, in the other, had to endorse the paper belonging to these principals, and deposited with them as agents, and the authority is the same in both cases; for although a correspondence, peculiar to the second, is relied upon, as qualifying or limiting the authority, it does not appear to us to possess that virtue; even supposing it could be imported into the consideration of the case, and allowed to influence the construction of the power of attorney, on which the authority of the agents rests.

It is admitted, on all hands, that if *Macleod* & Co., having the bills in their possession, had no power to endorse them, their act of endorsation would convey no title to the party taking and discounting them, any more than a forgery would do. It is equally admitted,

(*a*) See *Ante*, p. 1.

1849.

THE BANK OF BENGAL v. FAGAN.

on the other hand, that if they had the authority to endorse, their endorsement passed the property. It may be taken as also established, that whatever may have been the law laid down in *Gill* v. *Cubitt* (3 B. & C. 466), and *Down* v. *Halling* (4 B. & C. 330), and one or two other cases, and not abandoned, at least, as far as the language went, which the Court used in some subsequent cases, is now law no longer; and that the negligence of the party taking a negotiable instrument does not fix him with the defective title of the party passing it to him. Thus, the main and fundamental question is, had *Macleod* & Co. authority to endorse under the power of attorney? Which is in the same words in both cases.

It is to "sell, endorse and assign, or to receive payment of the principal according to the course of the Treasury—and to receive the consideration-money, and give a receipt for the same." It is contended for the Respondent, that the words, "sell, endorse and assign," used conjunctively, cannot be used in the disjunctive, but that the only power given to endorse is one ancillary to sale, and that we are to read it, as if it were, power to sell, and for the purposes of selling, to endorse. This construction is endeavoured to be supported by referring to the variation of "or" for "and" immediately following—"or to receive the money at the Treasury." We are unable to go along with this view of the instrument. The variation is clearly owing to a new subject-matter being introduced. The matter first dealt with, is the use of the paper as a continuing and subsisting instrument, as securities not paid off; the matter afterwards dealt with, is the receiving of the money due on these securities, when paid off, and when they ceased to exist—it is called

"payment of the principal," and then follows a like power to receive the consideration-money, and give receipts; that is, to receive the money, and give receipts for the money arising from the sale, endorsement, and assignment, because to that alone could this clause apply—the giving up the paper to the Treasury, authorised by the second clause, requiring no receipt whatever.

The change of "and" for "or" in the second clause does not, therefore, appear at all to alter or affect the construction of the first clause or member of the sentence. Shall we, then, say, that a power to "sell, endorse and assign," does not mean, a power to sell, a power to endorse, and a power to assign? And would not such a negative or exclusion be doing violence to the plain sense of the words? If we adopt this exclusive construction, we must hold, that these words not only give no powers to endorse, without selling, but also, that they give no power to sell without endorsing, and we must suppose the agent acting under such a power to be entirely crippled. Now, as there can be no doubt that this is a general form for powers of attorney to deal with negotiable instruments, and that in the general case, whatever may have been the understanding in the case at the Bar, the power to endorse is intended to be conveyed. Were we to adopt the Respondent's construction, we should sanction this position, not only that all powers now existing and acted on, and which have been acted on, if conceived in this form, are most defective, indeed, almost inoperative, and that what has been done under them, and is now done under them, is insufficient to convey a title to the taker of the negotiable instrument, but that in future, to make such powers com-

1849.

THE BANK OF BENGAL v. FAGAN.

plete, indeed, to render them useful, a new and very tautologous phraseology must be adopted, as this, "power to sell, and also to endorse, and also assign, or to endorse without selling, or to assign without selling or endorsing, or to sell without endorsing," and so forth. It appears to us, that the rational and the natural construction is the one which represents a power "to sell, endorse, and assign," as a power to sell, a power to endorse, and a power to assign—so that these acts may be done apart or together, and that the powers are conveyed conjointly and severally. The elliptical mode of expression, by not repeating the words "a power," or "full power," we consider to be thus properly supplied, and the expression thus justly expounded in the ordinary mode of parlance.

But it is said, that the power was given to do the acts in question on the donor's behalf. This is really only saying, that what the agent is to do, he is to do as representing the principal; as doing it on behalf of, or in the place and in the right of, the principal. But it is further said, that even if the expression be read as only amounting to this, the endorsement is to be only made for the benefit of the principal, and not for the purposes of the agent. We do not see how this very materially affects the case, for it only refers to the use to be made of the funds obtained from the endorsement, not to the power; it relates to the purpose of the execution, not to the limits of the power itself; and though the endorsee's title must depend upon the authority of the endorser, it cannot be made to depend upon the purposes for which the endorser performs his act under the power.

We find great reason to commend the ability and learning and diligence shown in the judgment deli-

vered below. But it would have been more satisfactory to have found that the argument, as urged before us in support of the judgment, had been considered by that Court. On the contrary, we cannot find any reference to the terms of the power, either in the judgment or in the reasons given in the petition of appeal. The Court seems to have assumed, that there was no authority to endorse. Indeed, the printed cases do not themselves seem to take the point, or to raise the question; and yet the Respondent here distinctly admits that the judgment cannot stand, if there was the power to endorse generally.

I have seen, since the argument, the printed forms used at the India House, of powers of attorney. They are all in the words here used, "endorse, sell and assign," and their title, which is placed in red ink at the top of the page, shows the meaning affixed in practice, to those words. It is, power "to sell or endorse."

Much reliance was placed by the Respondent on the case of *De Bouchout* v. *Goldsmid* (5 Ves. 211). But the question there was, whether shares could be pledged by an agent acting under power "to sell, assign and transfer," and the undisputed law, as to his being unable under an authority for selling, to pledge goods of his principal, was held applicable to shares as well as goods. The question here arises on a negotiable instrument, and it was by no means decided in the case referred to, that a power to "sell, endorse and assign," is confined to selling, without extending to endorsing. The frame of the two powers upon the construction of which the whole question here turns, is entirely different in the two cases. In the case of *De Bouchout* v. *Goldsmid*, there are only the words "sell, assign and transfer," and no word

1849.

THE BANK OF BENGAL v. FAGAN.

of pledging, or referring to deposit, at all. In 1834, I examined fully all the cases within the principle of *De Bouchout* v. *Goldsmid*, in the case of *Wilson* v. *Moore* (1 Myl. & K. 337),—approximating to the former case, and I am informed that this decision of *Wilson* v. *Moore* has since been constantly cited, as ruling the question; but I must remark, that in the judgment there given, I cited the cases of *Gill* v. *Cubitt*, and *Down* v. *Halling*, as having gone far to overrule *Lawson* v. *Weston* (4 Esp. 56). These cases are no longer law, and Lord *Kenyon's* opinion is set up and supported by all the lawyers.

As we are with the Appellants on this fundamental point, in both cases, it becomes unnecessary to say anything of the peculiar circumstances, which distinguish the second from the first appeal. There must be a reversal in both appeals.

In answer to the question of Counsel respecting the form of the Order to be made,

Lord *Brougham* said, that the judgment in both appeals being reversed, the Defendants ought to be placed in the same situation, as if there had been a verdict for them in the first instance: and there being no jury at *Calcutta*, the Court being both Judge and jury; it would, therefore, be out of all question to grant a new trial. The verdict must, therefore, be entered for the Defendants, in both cases.

By Orders in Council, bearing date the 30th day of *July*, 1849, it was ordered, that the judgments of the Supreme Court of *Fort William* in *Bengal*, be and the same were thereby reversed, and that verdicts be entered for the Defendants in the said causes or actions.

THE EAST INDIA COMPANY - - *Appellants*,

AND

ODITCHURN PAUL - - - *Respondent*.*

On Appeal from the Supreme Court of Judicature at Fort William in Bengal.

5th & 6th Dec., 1849.

THIS was an appeal against an order made by the Supreme Court at *Calcutta*, refusing a new trial in an

* Present: Members of the *Judicial Committee*,—Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillor,—*Assessor*,—The Right Hon. Sir Edward Ryan.

The Statute of Limitations, 21 *Jac* I., c. 16, extends to *India*.

The Statute, 9 *Geo.* IV., c. 14, (extended to *India* by the Indian Act, No. XIV. of 1840,) held to apply to an action pending in the Supreme Court at the time of its introduction into *India*.

In assumpsit, the breach of a contract is the cause of action, and the Statute of Limitations runs from the time of the breach, and not from the time of the refusal to perform the contract.

In 1822, A. purchased at a Government sale, at *Calcutta*, a quantity of salt, part of a larger portion then lying in the warehouse of the vendors (the Government) where the salt was to be delivered. By the conditions of sale, it was declared, that on payment of the purchase-money, the purchaser should be furnished with permits to enable him to take possession of the salt; there was also a stipulation that the salt purchased should be cleared from the place of delivery within twelve months from the day of sale, otherwise the purchaser was to pay warehouse rent for the quantity then afterwards to be delivered. The purchaser paid the purchase-money, and received permits for the delivery of the salt, which was delivered to him in various quantities, down to the year 1831; in which year, an inundation took place, which destroyed the salt in the warehouse, and there remained no salt to satisfy the contract. The purchaser petitioned the vendors for a return of the purchase-money, which was refused, on the ground, that the loss happened through his negligence in not sooner clearing the salt from the warehouse. An inquiry, however, took place at the instance of the Government, who referred the matter to the Salt Collector for a report. This inquiry was made by the Government without the purchaser being a party to it. The Collector did not make his report till the year 1838, and upon that report, the Government refused to return the purchase-money, claimed in respect of the deficient salt. The purchaser then brought an action of assumpsit for recovery of the purchase-money of such part of the salt as had not been delivered, alleging, as a breach,

1849.

THE EAST INDIA COMPANY v. ODITCHURN PAUL.

action of assumpsit, brought by the Respondent to recover damages from the Appellants for part of the purchase-money of a quantity of salt. The action was grounded on the non-performance, by the Appellants, of the contract, to deliver the whole quantity of salt sold.

The facts of the case, as they appeared in evidence at the trial, were as follows:—

In the month of *March*, 1822, a public sale of salt belonging to the Appellants took place at *Calcutta* in pursuance of an advertisement. Amongst the salt advertised for sale were 230,000 *maunds* in the *zillah* of *Hidgellee*, and 160,000 *maunds* in the division or *zillah* of *Tumlook*, the former of which places lies on the sea-coast, to the south-west of *Calcutta*. By the conditions of sale, contained in the advertisement, the salt was to be transported from the places of delivery, which were fully detailed in an advertisement published at the Government office, at the risk of the purchasers. On a payment in ready money being

the non-delivery thereof. To this the Defendants pleaded the Statute of Limitations, that the cause of action had accrued within six years before the commencement of the suit. The Supreme Court at *Calcutta* found a verdict for the Plaintiff. Held, upon appeal, reversing such verdict, that when the purchaser applied for the residue of the salt, and was told that there was none to deliver, the contract was broken, and the cause of action accrued from the time of such breach; and that the subsequent inquiries by the Government did not suspend the operation of the Statute of Limitations, till the year 1838, the time of the final refusal, and that the remedy was barred by the Statute.

Semble.—There may be an agreement, that in consideration of an inquiry into the merits of a disputed claim, no advantage should be taken of the Statute of Limitations, in respect of the time employed in the inquiry, and an action might be brought for a breach of such agreement.

At the trial, certain documents contained in the Schedule to the answer of the Defendants to a Bill of Discovery filed in Equity were read as evidence for the Plaintiff, but the Court refused to allow the Defendants to read the answer to which the Schedule was annexed. Held, that as the Supreme Court at *Calcutta*, being jurymen as well as judges, had refused to allow the answer to be read, on the ground that such answer contained nothing material to the issue which could influence their verdict, a new trial on the ground of such refusal would not be granted.

made, an order was to be immediately issued by the Secretary to the Board of Customs, Salt, and Opium, for the delivery of a quantity of salt equivalent to it, and the merchant was to be furnished with the order for delivery, and such *rowannahs* (*a*) as he might require for the salt, on his paying the *rowannah* fees as usual. It was further declared and stipulated, that all lots be cleared out from their respective places of delivery within the period of twelve months from the day of sale, and that in failure of such clearance, the purchaser should be subjected to the payment of *golah* (*b*) rent, at the rate of Rs. 5 per 1,000 *maunds*, *per mensem*, and a deduction for wastage at the rate of half a *maund* per 100 *maunds per mensem*, to commence from the expiration of the allotted period of clearance. That such lots as were not cleared out within the above period of twelve months, should be retained by the Salt Agent, or Superintendent of the *golahs*, until the claim for *golah*-rent should have been adjusted; or such portion thereof should be sold by public sale, as the Board of Customs, Salt, and Opium, might deem requisite, for realizing the amount due.

The sale took place on the 15th of *March*, when the Respondent became the purchaser of 34,000 *maunds*, of the years 1227 and 1228, B.E., then lying in *golahs* of the Appellants, in *zillah Hidgellee*, and 1,000 *maunds* in other *golahs* in *zillah Tumlook*, at which *golahs* the salt was to be delivered.

The purchase-money for the salt having been paid, the Respondent was furnished with *chaurs*, or delivery-orders, from the Secretary of the Board of Customs,

(*a*) Permits. (*b*) Warehouse.

1849.

THE EAST INDIA COMPANY v. ODITCHURN PAUL.

dated 2nd of *July*, 1822, for the salt, and of one of which the following is a copy :—

"*Hidgellee* Division.

"*Kalleenagur District*, 995 *maunds* of 82 *sicca* weight. *Oditchurn Paul* having paid for the clearance of 995 *maunds* of salt of 1228, being in full of his purchase of lot No. 34, on the 15th of *March*, 1822, you will please to weigh off and deliver the same to him on receipt hereof, but not suffer to be removed from the *ghaut* till the *rowannahs* for the salt shall be produced to you, after which you are to let it pass without further delay."

At the same time the Respondent was furnished with *rowannahs* for the removal of the salt, current for one year from their date.

The Respondent omitted to remove the salt, and in the month of *May*, 1823, more than twelve months after the purchase of the salt, while it still remained in the *golahs* of the Appellants, an extensive inundation of the sea occurred in the district of *Hidgellee*, where the *golahs* containing the salt were situated, and the consequence was, that a quantity of the salt purchased by the Respondent was destroyed, and a portion of the residue was deteriorated in value. A portion of the salt that remained was removed, but down to 1831, a quantity of it still remained in the *golahs*.

From the time of the sale, with the exception of certain renewals of the *rowannahs* made on the application of the Respondent, no communication was received by the Board from the purchaser of the salt

until 1827. On the 27th of *February*, in that year, a petition was presented by the Respondent to the Board, in which, after stating that he had sold the salt to sub-purchasers, who had afterwards failed in business, he prayed, that in consideration of the heavy loss which he must suffer, the Board would order a remission of *golah*-rent and deduction for wastage, to which he had become liable. The Board authorised the remission solicited by him, of wastage and *golah*-rent mentioned in his petition.

On the 21st of *May*, 1827, the Respondent presented another petition to the Board, in which he stated, that the 34,000 *maunds* of salt purchased by him, which were lying in the *golahs* in *Hidgellee*, remained still uncleared, and that the salt was unsaleable in consequence of the injury which it had sustained from the inundation, and also stated that the *rowannahs* for the delivery of the salt were then pledged with *Mehajuns* or bankers, and he prayed that the purchase-money, with interest, might be returned to him.

The Board referred this petition to their salt agents at *Hidgellee*, who reported thereon, denying the allegation contained therein; whereupon the Respondent presented other petitions to the Board, which were similarly referred, and the Board ultimately determined they could make no order.

In *November*, 1830, renewed *rowannahs*, for the period of six months, were obtained by the Respondent, and in *January*, 1831, application was made in the name of the Respondent, for part of the salt; and the salt agent, not being satisfied whether the *golah*-rent and wastage, as stipulated by the original conditions of sale, ought or ought not to be charged, he,

1849.

THE EAST INDIA COMPANY v. ODITCHURN PAUL.

on the 11th of *January*, 1831, wrote to the Board for directions on the subject. In the same month, viz. on the 25th of *January*, 1831, *Juggomohun Seal* and *Anundmohun Seal*, who represented themselves as the pledgees of the *rowannahs* granted to the Respondent, presented a petition, stating the doubt raised by the salt agent, and praying that the salt might be ordered to be delivered without deduction.

In consequence of these communications, the Board sent the following directions to the salt agent:—"The *golah*-rent and wastage adverted to by you were remitted by the Board on the 21st of *March*, 1827, under a promise on the part of the holder that the salt should be cleared from the public *golahs* immediately. Nearly four years having elapsed since that period, and so long a delay after the assurances given, would fully justify the Board's non-observance of a conditional promise altogether. They are not desirous, however, to press too hardly on the holders of the *chaurs* and *rowannahs*, as they are believed to have suffered considerably by these transactions with *Ramrutton Mullick* (the original purchaser); they will therefore forego any claim on the part of the Government to *golah*-rent or wastage, due prior to the 21st of *March*, 1827, but as, after that period, it was entirely the fault of the holders that the salt was not cleared out on the most favourable terms for themselves, they see no reason why any abatement should be made in the demands of the department; they therefore request that you will levy *golah*-rent and wastage on the salt from the 21st of *March*, 1827."

On the 29th of *January*, 1831, *Juggomohun Seal* presented a fresh petition, in which he submitted that the circumstance of the salt not having been exported

immediately was not imputable to the negligence of the merchant; that by reason of part of the salt having been found foul, discussions had arisen; and that, in consequence of the salt agent having maintained that the salt in store was the very salt sold, it was found there was no alternative, and that, accordingly, in *November*, 1830, a renewal of the *rowannahs* had been obtained; and he urged that the *golah*-rent and wastage should be wholly remitted.

Whereupon it was determined by the Board not to exact the *golah*-rent and wastage. And on the 4th of *May*, 1831, *Juggomohun Seal* entered into an agreement, that, in fairly weighing out the salt from the *Sircarry golah*, if, in the dryage from the 21st of *March*, 1827, there be found a trifling diminution, he would make no claim on that score.

A part only of the salt was removed, and on the 30th of *October*, 1831, a second inundation took place, whereby a great part of the salt purchased by the Respondent, and still lying in the *golahs*, was destroyed.

On the 10th of *February*, 1832, *Juggomohun Seal* presented a petition, whereby, without noticing the inundation, he alleged, that he had removed all the salt that could be had, and that there turned out to be a deficiency of more than 10,000 *maunds*, and he prayed that he might be compensated, with interest.

On the 9th of *March*, 1832, this petition was referred by the Board to their salt agent, Mr. *Donnithorne*, for investigation.

On the 13th of *July*, 1832, *Juggomohun Seal* presented another petition, representing that no report had yet been made by the salt agent. In consequence, on the 17th of *July*, 1832, another letter was ad-

1849.

THE EAST INDIA COMPANY v. ODITCHURN PAUL.

dressed by the Board to Mr. *Donnithorne*, calling his attention to the subject.

On the 14th of *August*, 1832, Mr. *Donnithorne* made a report to the Board, by which he showed the actual quantities which had been delivered to the petitioner, and deduced the result to be as follows: "The actual deficiency occasioned by two serious inundations, as also by wastage, during the great length of time the article was allowed to remain in the *golahs*, 7,639 *maunds*;" adding, "had the *Beoparee* cleared the salt out of the *golahs*, according to his engagement, instead of perpetually offering objections, no defalcation would have arisen; but fully aware, as I conceive from the information of his *gomastahs*, that a dreadful loss must have taken place by the late hurricane, he has been induced to offer this false representation, in order that the total loss of the article should be ultimately sustained by the Government."

In consequence of this report, the Board did not accede to the claim made for compensation, and for more than two years nothing further was heard on the subject. On the 17th of *September*, 1834, *Juggomohun Seal* presented another petition, in which, after referring to his petition of the 10th of *February*, 1832, and the report made thereon, he stated that prior to the storm of the 31st of *October*, 1831, he had delivered in his *chaur* and *rowannahs*, and that then a large quantity of the salt was not forthcoming, and prayed that the money, with interest and expenses, should be returned. On the 30th of *November*, 1835, he again presented a petition for the same purpose, stating that no order had yet been made by the Board on his petition of the 10th of *February*, 1832, and praying that the Board would make the order desired.

In the meantime, Mr. *Donnithorne* had retired from the office of salt agent at *Hidgellee*, and Mr. *John Henry Barlow* was appointed to succeed him, and the Board having determined to make renewed inquiry into the subject, on the 12th of *December*, 1835, forwarded to Mr. *Barlow* the former petition of the 10th of *February*, 1832, Mr. *Donnithorne's* report thereon, and the subsequent petitions.

Mr. *Barlow* instituted the inquiry, and on the 16th of *May*, 1838, communicated the result to the Board in a letter.

Though Mr. *Barlow's* report was in some respects rather more favourable to the Respondent than that of Mr. *Donnithorne*, still it appeared to the Board that there was no ground to doubt but that the deficiency in the salt was owing entirely to the inactivity and negligence of the Respondent in leaving the salt unremoved for so many years; and, under these circumstances, the Board declined to accede to the prayer of the petitions, and refused to make an order in his favour.

On the 18th of *July*, 1839, the present action was commenced by the Respondent against the Appellants, on the plea side of the Supreme Court of *Calcutta*. The declaration contained three special counts: the first count stated, that on the 2nd of *July*, 1822, the Respondent bought of the Appellants large quantities of salt, of the manufacture of certain years, deliverable to him at certain *golahs* or storehouses of the Appellants, situate at *Kalleenagur*, in the *zillah* of *Hidgellee*, in the province of *Bengal*, at any time within twelve months from the 15th of *March*, 1822, and thereafter to be subject to *golah*-rent at a certain rate per annum, and subject to certain deductions for

1849.

THE EAST INDIA COMPANY v. ODITCHURN PAUL.

waste as therein specified: whereupon the Appellants promised to deliver the salt to the Respondent, from the *golahs* at *Kalleenagur*, on production of the *chaurs* and *rowannahs*, when the Appellants should be requested so to do. And that, although he, the Respondent, had frequently, since the 2nd of *July*, 1822, requested the Appellants to make delivery of the same salt to him, at *Kalleenagur* aforesaid, upon production of the said *chaurs* and *rowannahs*, and offered to pay *golah*-rent, and allow the deduction for wastage at the rates respectively agreed; and although the Appellants, in part performance of their promise, had, at different times, since the 2nd of *July*, 1822, delivered to the Respondent, divers, to wit 36,000 *maunds* of the salt, in part of the salt so bought; yet the Appellants had wholly neglected and refused to deliver the residue of the salt to the Respondent. The second and third counts were similar to the first, varying only as to the quantities of salt, and the places where it was deposited, and the time when it was deliverable. The declaration also contained the usual money-counts for money had and received on an account stated, and for interest, and the damages were laid at Rs. 200,000.

The Appellants pleaded the following pleas to the declaration:—First. *Non assumpsit*. Secondly; that the alleged cause of action did not accrue within six years, as required by the English Statute of Limitations. Thirdly; as to the first count, that the 4,000 *maunds* of salt therein mentioned were suffered by the Respondent to remain in the *golahs* of the Appellants at *Kalleenagur*, in the *zillah* of *Hidgellee*, from the 15th of *March*, 1822, to the 27th of *May*, 1823, the time of the tempest and inundation hereinbefore mentioned; that during that period they had never refused

to deliver the 4,000 *maunds* of salt, and were never applied to for the delivery of the same, but were, till the time of such tempest and inundation, ready and willing to deliver the same; that the Respondent, during all that time, neglected to remove the salt from the *golahs*, and while it was so remaining, by such neglect of the Respondent, on the 27th of *May*, 1823, a violent storm, attended with an inundation of the sea, swept over the place where the salt was warehoused, and wholly destroyed the same, whereby the Appellants were then and had ever since been unable to deliver the salt in pursuance of the contract in the first count mentioned. Fourth; as to the second count, a plea similar to the third. Fifth; as to the third count, a plea similar to the third and fourth.

The Respondent, by his replication, joined issue upon the first plea, traversed the second, and replied generally, *de injuria*, to the other pleas.

In *March*, 1841, before the action at law was tried, the Respondent, *Ram Rutton Mullick* and *Jaggomohun Seal*, filed a bill of discovery, on the equity side of the Supreme Court at *Calcutta*, against the Appellants and Mr. *Henry Parker*, then the first member of the Board of Customs, Salt, and Opium. The bill sought to establish some admission to take the case out of the Statute of Limitations, and required a full discovery of everything connected with the transactions, and a full discovery of all books and papers relating to the matters in question, which were in the possession or power of the Defendants.

The Appellants and *Parker* put in their joint and several answers to the bill, stating the circumstances respecting the two inundations of 1823 and 1831, and the loss occasioned to the salt thereby, and alleged

1849.

THE EAST INDIA COMPANY v. ODITCHURN PAUL.

that in substance, and in fact, the original agreement for sale of the salt had been performed on the part of the Appellants, and denied the allegation of any admission to take the case out of the Statute, and in the schedules set forth at length, petitions, and other documents, before stated, and in another schedule set forth a list of all papers and documents in their possession relating to the matters in question.

On the 8th *July*, 1842, an order in the suit in Equity was made by consent, that the Defendants should deposit with the Equity Registrar of the Court, for the inspection of the Plaintiffs, all the documents scheduled to the answer, and this was accordingly done.

The action at law was tried on the 25th and 26th of *July*, 1842, on the Plea side of the Supreme Court, before Mr. Justice *Grant* and Mr. Justice *Seton*.

In the course of the trial, the counsel for the Respondent tendered as evidence, the originals of the following documents, viz. *Juggomohun's* petition on the 10th of *February*, 1832, and the 30th of *November*, 1835. The letter of the Board of the 12th of *December*, 1835. Mr. *Barlow's* letter of the 31st of *December*, 1835, and the answer thereto, and Mr. *Barlow's* report of the 16th of *May*, 1838, the production of which from the Equity side of the Court, he had obtained by means of an *ex parte* order which had been made on the Plea side of the Court, bearing date the 20th of *July*, 1842, but of which no notice whatever had been given to the Appellants. The Respondent, at the same time, put in the order on the Equity side of the Court, of the 8th of *July*, 1842, and the order of the 20th of *July*, 1842, and called a witness to prove the official character of the documents above mentioned. The Counsel for the Appellants objected to the reception

BENGAL SECRETARIAT LIBRARY

1845.

THE EAST INDIA COMPANY v. ODITCHURN PAUL.

of these documents in evidence, unless the answer, of which they formed part, were likewise put in, both on the ground, that the *ex parte* order on the Plea side of the Court was irregular, and was a surprise on the Appellants, and also on the ground, that it appeared by the Orders produced, that the documents in question were parts of the answer to the Bill in Equity. The Counsel for the Respondent refused to put in the answer as evidence, and the Court, overruling the objection taken on behalf of the Appellants, admitted the documents and papers as evidence, without the answer.

At the conclusion of the case, the Court gave interlocutory judgment, in the nature of a verdict, in favour of the Respondent, for the sum of S.Rs. 39,740. 8a. 9p., which sum was calculated on the ground of no allowance being made for *golah*-rent or wastage.

On the 27th of *October*, 1842, a rule *nisi*, to show cause why the verdict should not be set aside, and a new trial granted, was obtained by the Appellants, on the grounds; First, that evidence was improperly received at the trial; and secondly, that there was no evidence to take the case out of the Statute of Limitations.

The rule was, after argument before the full Court, *in Bank*, composed of the Chief Justice, Sir *Lawrence Peel*, and Mr. Justice *Grant* and Mr. Justice *Seton*, by an order, bearing date the 17th of *November*, 1842, discharged, with costs. The grounds on which the Court discharged the order were thus stated by the Chief Justice:—"It was not necessary to decide whether the evidence objected to had been properly received. Had it been necessary to decide the question, he should have concurred in the decision which the learned Judges who had tried the cause had made,

1849.

THE EAST INDIA COMPANY v. ODITCHURN PAUL.

for he thought that the regularity of the order, under which the documents had been produced, could not be entered into at the trial, the documents being, in fact, produced and proved in the usual mode, and being evidence *per se*, and, without the aid of the answer, were, in his opinion, rightly admitted in evidence; but, it was unnecessary to decide this question. It was also unnecessary to decide whether the Indian Act (No. XIV. of 1840) included an action commenced before the passing of that Act; or whether that which was relied on as acknowledgment, to defeat the operation of the Statute of Limitations, amounted to any such acknowledgment, or the effect of such an acknowledgment, in an action of this description; or, lastly, whether it was binding on the East India Company, since the Court thought that the cause of action arose within six years from the commencement of the suit. It appeared, by the Defendants' own evidence, that the salt was detained for *golah*-rent, for which they had, by the contract, a right to detain it. This was waived up to the 4th of *May*, 1831, by the Defendants, upon the petition of the party entitled to the delivery of the salt, and of the petition of the 10th of *February*, 1832, which the documents produced by the Defendants in evidence referred to, requested an inquiry into the circumstances connected with the undelivered salt. The Court thought that the East India Company having, upon the petition of the 10th of *February*, 1832, consented to that inquiry, no refusal to deliver the salt could be said to have taken place before the conclusion of that inquiry, which did not terminate until within six years of the time when the action was brought."

From this decision the Appellants appealed to Her Majesty in Council.

The Attorney-General (Sir *John Jervis*), Mr. *Wigram*, Q. C., and Mr. *Forsyth*, for the Appellants.

Two principal questions arise: First, as to the improper reception of evidence at the trial; and secondly, whether, as the cause of action accrued more than six years before the commencement of the action, the Plaintiff is not barred by the Statute of Limitations, there being no evidence before the Court below, of any recognition of the contract by the Defendants, to take the case out of the operation of the Statute of Limitations.

I. With respect to the question concerning the reception of evidence, we submit that there was a miscarriage. The Respondent was allowed to use in evidence, documents which it appeared at the trial had been produced by the Appellants only as part of their answer to the Respondent's Bill in Equity, which was for discovery only, and not for relief; such evidence ought not to have been received without the answer being also read, and the Court was bound to decide the question of the admissibility of the documents without eluding the point then pressed upon them. The answer contained statements which would have materially affected the decision of the case, both as respected the operation of the Statute of Limitations and the right of the Respondent to recover damages. It is clear law that the schedule to an answer is part of an answer, and that the documents produced and referred in an answer, cannot be read by either party without reading the Bill and answer. *Hewitt* v. *Pigott* (*a*). *Brown*

(*a*) 5 Cur. & Pay. 75

1849.

THE EAST INDIA COMPANY v. ODITCHURN PAUL.

v. *Thornton* (*a*). *Long* v. *Champion* (*b*).—[Lord *Campbell*: This is not a Bill of Exceptions; it is an application for a new trial; and you must show that you are prejudiced by the answer not being read. Sir *Edward Ryan* says, it is not the practice of the Supreme Court at *Calcutta*, to grant a new trial upon a technical objection, when they clearly see that the admission or rejection of the evidence did not have any effect upon the verdict.]—It is a familiar rule here, that, whatever the quantity of the evidence rejected may be, nobody can say what effect may have been produced if it had been admitted.—[Lord *Campbell*: We are in the same situation as the Court below, being both Judge and jury, and if we think the evidence that was rejected ought to be admitted, we can give it its weight.]—The order for production of the documents was irregularly obtained, and a surprise upon the Appellants.

II. But the important question really is, when did the Statute of Limitations, 21 *Jac.* I., c. 16, begin to run.—[Lord *Campbell*: Does the Statute extend to *India*?]—Yes, it admitted that it was introduced into *India* previous to the Charter. The law is clear, that the Statute runs from the time of the breach, for that constitutes the cause of action. *Battley* v. *Faulkner* (*c*). *Howell* v. *Young* (*d*). *Short* v. *M'Carthy* (*e*). *Colvin* v. *Buckle* (*f*). *Pott* v. *Clegg* (*g*). *Kennet and Avon Canal Company* v. *The Great Western Railway Company* (*h*). These cases clearly establish the rule,

(*a*) 1 Myl. & Cr. 246-8. (*b*) 2 Bar. & Ad. 284.
(*c*) 3 Bar. & Ald. 288. (*d*) 5 Bar. & Cr. 259.
(*e*) 3 Bar & Ald. 626; and see 2 Wms. Saund 63, n. 6.
(*f*) 8 Mee & Wel. 680. (*g*) 16 Mee & Wel. 321
(*h*) 7 Q. B Rep. 824.

that when once the cause of action accrues, the limitation dates, not from the time when it came to the knowledge of the party, but from the time when the breach of the contract, or duty, took place. It was erroneous to suppose that the question turned upon a refusal to deliver. The question is confined to this point, when did the Statute begin to run? The inundation put it out of our power to deliver the salt; the breach was complete, and then the Statute commenced running. *Short* v. *Stone* (*a*), *Lovelock* v. *Franklyn* (*b*), establishes this proposition, that, when a request is unnecessary, by reason of an act done by the party, which puts it out of his power to comply with such request, no request is necessary. We submit, therefore, upon this point, that there has been a miscarriage, as the learned Judge was wrong in the view which he took, the action being clearly barred. The cause of action accrued, at least, in *February*, 1832, more than six years from the commencement of the action, and was barred by the Statute of Limitations. Nothing was shown in the evidence in the Court below, either to prove that the Appellants recognised the continuing liability to deliver the salt or to take the case out of the operation of the Statute. This involves another point, not decided by the Court below, namely, whether the Statute, 9 *Geo.* IV., c. 14, applied to this particular case. That Statute was extended to *India* by the Indian Act, No. XIV. of 1840, pending this action, but before plea. *Towler* v. *Chatterton* (*c*) is an authority upon this question, and must be held to apply. Now this case can only be taken out of the general operation of the Statute of Limitations by

(*a*) 8 Q. B. Rep. 358. (*b*) 8 Q. B. Rep. 371.
(*c*) 6 Bing. 258.

1849

THE EAST INDIA COMPANY v. ODITCHURN PAUL.

something that would satisfy the provisions of the 9th *Geo.* IV., c. 14, which must be an acknowledgment in writing, clear and specific, signed by a party who has power to bind us It is manifest that the ground on which the Court below held the operation of the Statute of Limitations to be excluded, namely, that no refusal to deliver the salt could be said to have taken place pending the inquiry by Mr *Barlow*, is not sustainable The inquiry was a private one by the Board, by one of their own servants, for their own satisfaction, to which the Respondent was no party, and with which he had no concern. The right of the Respondent accrued certainly in 1832, if not earlier. There is another defence to this action It is a well-known rule at law with respect to injuries of this description, by inundation, or fire, that the warehouseman would not be liable for any loss, except he has been guilty of negligence. *Story's* Com. on the Law of Bailments, p. 452. The negligence was on the part of the Respondent in not removing the salt within a reasonable time, as required by Ben. Reg. X. of 1817, section 36

Mr *Greenwood*, Q. C., and Mr. *Leith*, for the Respondent.

First, we submit that the evidence objected to was, under the special circumstances of the case, properly received by the Court below, in conformity with the practice of that Court, and secondly, that the Plaintiff's remedy, by action, was not destroyed by any statutory or other bar.—[Lord *Campbell*· You need not address their Lordships upon the question of the admissibility of evidence, as our minds are made up upon that point.]—The real question then is narrowed

to the operation of the Statute of Limitations. The cause of action is founded on the non-performance of the contract, occasioned by the Appellants' neglect, and refusal to deliver. There are three grounds of defence pleaded; first, *non assumpsit;* secondly, the English Statute of Limitation, *non accrevit infra sex annos;* and thirdly, that the undelivered portions of the salt were destroyed by an inundation, by reason of which the Appellants were unable to deliver to the Respondent.—[Lord *Campbell*: We must take it that the contract was broken.]—*Simmons* v. *Swift* (*a*) is a strong case in our favour, and very much resembles the present case; there, the owner of a stock of bark entered into a contract to sell it at a certain price, per ton, and the purchaser agreed to take and pay for it on a day specified; and a part was afterwards weighed and delivered, and taken away by him; the rest was carried away by a flood. The vendor brought an action of assumpsit, for bark sold and delivered; but the Court held that the action was not maintainable, as the property in the residue did not vest in the purchaser until it had been weighed.—[Mr. *Pemberton Leigh*: *Logan* v. *Le Mesurier* (*b*), decided here, was to the same effect. It was there held, that the risk remained with the sellers.]—The case put by the Appellants, that they were warehousemen, is wrong. The stipulation in the conditions of sale, that the purchaser was to pay warehouse rent, amounted to nothing more than making a payment in respect of the convenience afforded to the purchaser for letting it remain on the premises; it was a running contract for rent. The property in the salt never passed to the purchaser

(*a*) 5 Bar. & Cr. 857. (*b*) 6 Moore's P. C. Cases, 116.

1849.

THE EAST INDIA COMPANY v. ODITCHURN PAUL.

until it was separated and weighed off. The cases cited on the other side upon this branch of the case have no application to the present; here, the salt has always remained the property of the sellers, and there has been an actual loss of that proportion of the salt which was contracted to be delivered. Our proposition is, that the right of action only accrued in 1838, when the Appellants refused us compensation. It was a running inquiry up to the time of Mr. *Barlow's* report.—[Lord *Campbell*: The contract was clearly broken in 1832, when there was no salt to deliver, and the Respondent knew of that inability. The Statute was running on while the inquiry was being made, as your right of action arose when the Appellants were not in a condition to deliver the salt.]—Here is a contract, in a particular form, and, so long as a party regards the contract and makes his demand at the time stipulated, that is all that is required. The inability of one party to fulfil the contract can make no difference. It is not necessary for a merchant to express, in technical terms, his desire to have the article he contracted for, with a view to make a conversion by a demand and refusal. The Respondent was constantly pressing for the completion of the contract. The demand was not made by a person acquainted with English law, and ought, therefore, to be looked at with indulgence. A harsh construction would be productive of injustice; the more so, as the Respondent is a Hindoo: and if the position of the parties to the action had been reversed, and he been Defendant instead of Plaintiff, he would have been entitled, under Statute, 21 *Geo.* III., c. 70, to have had the case tried by the Hindoo Law; the limitation of suits, under the Hindoo Law, would have been

twelve years, when this six years' bar could not have been set up. If the Appellants make out, that the moment we knew of the inability of the vendors to fulfil the contract, we had a right of action, from which time the Statute of Limitations runs, then we say, that we had a right to recover, on the count, for money had and received, for there has been an entire failure of the delivery of the salt, and the money has been paid. Where a party enters into a contract for the delivery of an article, which is improperly disposed of by the vendor, you may either bring an action of trover for the conversion, or acquiesce in his agency, and bring an action for money had and received.—[Lord *Campbell*: The difficulty is, that there was no acknowledgment of the debt within the six years, as required by Statute, 9 *Geo.* IV., c. 14.]—That Statute was imported into *India*, by the Indian Act, No. XIV. of 1840, and was not in force in *India* at the time the action was brought. *Towler* v. *Chatterton* (*a*), shows the time when this Act of Parliament operates upon a suit, in which the Statute is pleaded. Independently, however, of the Statute, enough appears to constitute an acknowledgment in bar of the Statute. It is a mixed case of written admissions and acts of the parties. The report of Mr. *Barlow*, the servant of the Appellants, is an admission. *Colledge* v. *Horn* (*b*). *East India Company* v. *Prince* (*c*). *Pierce* v. *Brewster* (*d*). The *Bengal* Regulation X. of 1819, sec. 36, has no bearing upon the case, it is merely a fiscal Regulation to prevent smuggling.

(*a*) 6 Bing. 258.
(*b*) 3 Bing. 119.
(*c*) Ry. & Moo. 407.
(*d*) 12 Moore's Rep. 515.

1849.

THE EAST INDIA COMPANY v. ODITCHURN PAUL.

Mr. *Wigram*, in reply,

Referred to *Greenfell* v. *Girdlestone* (*a*) and *Cripps* v. *Davis* (*b*).

Judgment was reserved, and now delivered by

Lord CAMPBELL:

12th Feb., 1850.

This is an appeal from a rule of the Supreme Court of Judicature at *Calcutta*, by which a rule *nisi*, for a new trial, was discharged with costs.

The action, which was commenced on the 18th of *July*, 1839, by the Respondent against the Appellants, was in assumpsit. The declaration contained special counts, on a contract for the sale and delivery of salt, alleging for breach, the non-delivery of a considerable part of the salt, with the usual money counts.

There were several pleas in bar; but the only one now material, is, "That the cause of action did not accrue within six years next before the commencement of the suit," the Statute law of *England* upon this subject being in force at *Calcutta*. The Plaintiff replied, "That the cause of action did accrue within six years before the commencement of the suit," and thereupon issue was joined.

The trial took place before Mr. Justice *Grant* and Mr. Justice *Seton*, on the 25th and 26th days of *July*, 1842. It then appeared in evidence, that on the 15th of *March*, 1822, and at a public sale of salt, (a commodity of which the East India Company have the monopoly,) the Plaintiff became the purchaser of 34,000 *maunds*, then lying in *golahs* (or warehouses,) of the Defendants, in *Hidgellee*. By the conditions of

(*a*) 2 Y. & C. 662. (*b*) 12 Mee. & Wel. 159.

sale it was declared, that "on a payment in ready money being made, an order would be given for the delivery of an equivalent quantity of salt, and the purchaser would be furnished with *perwannahs* (or permits), which were necessary to enable him to be lawfully in possession of it." There was a further stipulation, "That all the lots of salt purchased, should be cleared out from the several places of delivery within twelve months from the day of sale, otherwise the purchaser was to be subject to *golah*-rent, and a deduction of half a *maund* on one hundred *maunds*, per mensem, was to be made from the quantity to be afterwards delivered." The Plaintiff immediately paid the whole of the purchase-money, and received *rowannahs*, which were to be in force for a twelvemonth. These *rowannahs* were renewed till *November*, 1831, and no longer.

In *May*, 1823, before any of the salt had been cleared, there was an inundation at *Hidgellee*, which destroyed part of the salt lying in the *golahs*, and damaged other part of it. Between that time and *October*, 1831, there were deliveries to the Plaintiff, amounting to nearly 20,000 *maunds;* and no more was ever delivered. On the 31st day of *October*, 1831, there was another inundation in the district of *Hidgellee*, which swept away almost the whole of the residue of the salt in the *golahs*. The Plaintiff soon after presented the delivery orders and *rowannahs* at the *golahs*, and demanded the 10,000 *maunds* remaining to be delivered; but was told by the *golah*-keepers that no more salt remained to satisfy the contract. He then petitioned for a return of the purchase-money, which was refused, on the ground that the loss had happened through his negligence in not sooner clear-

1849.

THE EAST INDIA COMPANY v. ODITCHURN PAUL.

ing the salt from the *golahs*. However, the proper authorities consented that the matter should be inquired into by Mr. *Donnithorne*, the salt agent at *Hidgellee*; and in *August*, 1832, he made a report, in which he stated, that "if the purchaser had cleared the salt out of the *golahs*, according to his engagement, instead of perpetually offering objections, no defalcation would have arisen;" and he represented that the salt had been lost by wastage before the late inundation. The Plaintiff presented another Petition, denying these facts, and praying that the purchase-money for the 10,000 *maunds* deficient should be returned to him; and on the 12th of *December*, 1835, a fresh inquiry was ordered by the proper authorities, representing the Company, to Mr. *Barlow*, another gentleman who had succeeded Mr. *Donnithorne*. Mr. *Barlow* did not make his report till the 16th of *May*, 1838; and upon the report which he then made, the Company finally refused to return the purchase-money, claimed in respect of the deficient salt.

There was a verdict for the Plaintiff, with damages equal to the price of the whole of the deficient salt, and interest, from *November*, 1831.

At the trial, various documents were read in evidence, which had been produced by virtue of a Bill of Discovery filed by the Plaintiff against the Company, although the Company's answer, by their officer, which detailed the transactions, was not read.

The rule for a new trial was obtained on two grounds: First, that these documents were improperly admitted in evidence, without reading the answer to the Bill of Discovery; and secondly, that upon the evidence, the Statute of Limitations was a bar.

Cause being shown before Chief Justice *Peel* and

his brethren, he said, it was unnecessary to decide whether the answer ought to have been read or not, as they were all of opinion that it did not contain anything material to influence the verdict, and that "the East India Company having, upon the Petition of the 10th of *February*, 1832, consented to that inquiry, no refusal to deliver the salt could be said to have taken place before the conclusion of that inquiry, which did not terminate until within six years of the time when the action was brought." They, therefore, discharged the rule with costs.

We entirely agree with the Court below, in thinking, that the first ground on which the verdict was impeached cannot be supported. From the notes of the trial, there is a doubt whether the Counsel for the Company did more than object to the regularity of the Order under which the documents were produced, and this certainly could not be inquired into at the trial. Supposing, however, that the answer ought to have been read, still, before a new trial is granted, for withholding it, the Defendants were bound to show that it might have materially influenced the verdict. The common Law Courts in *England* have considered themselves compelled to grant a new trial, if any evidence had been improperly admitted or rejected at *Nisi prius*, however little it may weigh, because the objecting party might have tendered a Bill of Exceptions, upon which the Court of Error would be bound to grant a *venire de novo*; and, to save the delay and expense of such a proceeding, it has been thought more convenient that a new trial should be granted by the Court in which the action was originally brought. But it has been certified to us, by Sir *Edward Ryan*, the very learned late Chief Justice

1849.

THE EAST INDIA COMPANY v. ODITCHURN PAUL.

of *Calcutta*, that a different rule prevails in the Supreme Court there; and considering the constitution of that Court, and the line of distinguished men who have presided in it, strange would it have been if the rule had not been different. The same individuals being Judges and jurymen, the proceeding would be preposterous, if, in their capacity of Judges, they were to grant a new trial before themselves, as jurymen, by reason of the admission or rejection of evidence, which they feel could not alter the verdict. They very properly follow the practice of equity Judges in *England*; where an issue has been granted, and an application is made for a new trial, on the ground of the improper rejection or admission of evidence, there no Bill of Exceptions lies; and although the objection is in strictness well founded, a new trial is granted or refused, according to the importance of the evidence which has been admitted or rejected. The learned Judges, in the present case, thought that the answer could not have influenced their verdict. We have carefully read the answer, and have come to the same conclusion. We, therefore, think, that on the first ground, the verdict ought not to be disturbed.

It would have been very satisfactory to us, if, consistently with the rules of law, we could have found evidence to show that any cause of action, stated in the declaration, arose to the Plaintiff, within six years before the commencement of his suit. There seems no doubt that the Defendants have broken their faith with him, and that if he had commenced his action against them, in *February*, 1832, instead of agreeing to the inquiry which was conducted so tediously, he would have been entitled to damages equivalent to the salt which remained undelivered. But this inquiry,

through the fault of the Company's servants, was not terminated till the 16th of *May*, 1838. Almost as soon as the final refusal of the Company to return any part of the purchase-money was communicated to the Plaintiff, he commenced the present action. It will, therefore, be an extreme hardship upon him, if, by reason of this delay, which they occasioned, they may successfully defend themselves, by pleading the Statute of Limitations. But it is the duty of all Courts of Justice to take care for the general good of the community, that hard cases do not make bad law.

Upon the special counts of the declaration, the cause of action disclosed is the refusal to deliver the residue of the salt purchased and paid for. When did this accrue? From that point of time the Statute of Limitations began to run; and when it once began to run, nothing could stop it; so that in six years thereafter the right of suit was barred. The rule is firmly established, that in assumpsit, the breach of contract is the cause of action, and that the Statute runs from the time of the breach, even where there is fraud on the part of the Defendant. *Battley* v. *Faulkner* (3 Bar. & Ald. 288). *Short* v. *M'Carthy* (ib. 626). *Brown* v. *Howard* (2 Brod. & Bing. 73). When the Plaintiff tried to obtain the 10,000 *maunds* of salt, and he was told by the agents of the Company that there was no salt in the *golahs* to deliver to him, the contract was undoubtedly broken, and the cause of action has accrued. It has been contended, that the subsequent negotiations and inquiries suspended the operation of the Statute, till 1838, when there was a final refusal to make any compensation, or, that a new right of action then accrued. But no authority has been, or can be cited to support either of these pro-

1849.

THE EAST INDIA COMPANY v. ODITCHURN PAUL.

positions, and we are reluctantly obliged to overrule them both. There might be an agreement that in consideration of an inquiry into the merits of a disputed claim, advantage should not be taken of the Statute of Limitations in respect of the time employed in the inquiry, and an action might be brought for breach of such an agreement; but if to an action for the original cause of action the Statute of Limitations is pleaded, upon which issue is joined—proof being given that the action did clearly accrue more than six years before the commencement of the suit—the Defendant, notwithstanding any agreement to inquire, is entitled to the verdict.

Chief Justice *Peel* rests the judgment of the Court upon the supposition, that there had been no refusal to deliver the salt until the conclusion of the inquiry. Till then there certainly had been no absolute refusal to make compensation, by returning a part of the purchase-money, but in 1831 and 1832 there had been a refusal to deliver the salt. The controversy then was, whether the salt was in the *golahs* at the time of the second inundation; but whether it was, or was not, the contract was equally broken, and neither party contemplated a performance of the contract by any further delivery of salt. The inquiry was only to decide whether a pecuniary compensation was to be made, and what should be the amount of it.

Although the judgment of the Court rested entirely upon the special counts of the declaration, it has been very ingeniously argued at our bar, that the Plaintiff may recover the price of the 10,000 deficient *maunds*, on the count for money had and received, as the contract may be considered as subsisting, till Mr. *Barlow's* report, and that it was subsequently rescinded.

But there appears to us to be insuperable difficulties to be encountered in attempting so to shape the Plaintiff's case. There is no stipulation in the original contract for allowing it to be rescinded by either party, either entirely or partially, and the Defendants have never agreed to its being in any way rescinded. Then there clearly has not been an entire failure of consideration, for the Plaintiff has received and disposed of nearly 24,000 *maunds* of salt delivered to him by the Defendants. The contract could not afterwards be rescinded by the Plaintiff, and his only remedy was an action for the breach of it, in not delivering the residue of the salt to which he was entitled. Even if he could proceed as upon a rescinding of the contract, the Statute of Limitations would equally be a bar to the counts for money had and received, for he might have brought his action on this count as well in 1832, as in 1839. We have been told in answer to this objection, that the transactions in the interval amount to an acknowledgment which will take the case out of the Statute, 21 *Jac.* I., c. 16, and that the Statute, 9 *Geo.* IV., c. 14, does not apply, because this action had been commenced before that Statute was made law in *India*. But there are repeated decisions in Westminster Hall, that it applied to actions pending when it passed; and in *India*, it must have a like operation. Besides, independently of 9 *Geo.* IV., c. 14, no sufficient evidence was offered to take the case out of the Statute, 21 *Jac.* I., c. 16, for in none of the correspondence or negotiations did the Company ever acknowledge that they were indebted to the Plaintiff, or that they were liable to him in any shape.

We are, therefore, of opinion, that the rule for setting aside the verdict, and granting a new trial, should be made absolute.

MUTTYLOLL SEAL - - - *Appellant,*

AND

ANNUNDOCHUNDER SANDLE and JOGENDERCHUNDER SANDLE - - } *Respondents.**

On Appeal from the Supreme Court at Fort William, in Bengal.

6th & 7th Dec., 1849.

Conveyance by Lease and Release in fee, in the circumstances, held to be subject to a parol defeazance, and to be in the nature of a mortgage, with a power of re-purchase on the footing of redemption; and a re-conveyance decreed.

THE question in this appeal was, whether the dealing with certain real estate (a conveyance of which was made in fee by way of Lease and Release), constituted, under the circumstances, an absolute and unconditional sale, or whether it was not in the nature of a mortgage transaction, and liable to a defeazance.

The facts of the case were as follows:—Some time previous to *August*, 1842, *Muddoosoodun Sandle* applied to the Appellant, to advance him the sum of Rs. 30,000, which the Appellant agreed to lend, at the rate of 17 per cent. per annum. On the 13th of *August*, 1842, *Muddoosoodun Sandle*, having pressing occasion for Rs. 20,000, part of the Rs. 30,000, the Appellant advanced him the same, and *Muddoosoodun Sandle* and the Respondent *Annundochunder Sandle*, (his eldest son), on the same day, executed a joint and several bond for the payment to the Appellant of the sum of Rs. 20,000, with interest thereon, after

* Present: Members of the *Judicial Committee*,—Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillor,—*Assessor*,—The Right Hon. Sir Edward Ryan.

the rate of 12 Rs. per cent. per annum, and by way of further security, also executed on the same day a warrant of attorney, to confess judgment on the bond, with a defeazance thereupon endorsed in the usual form, for making void the same on repayment of the sum of Rs. 20,000, with interest, and with stay of execution.

By indentures of lease and release, bearing date, respectively, the 31st of *August* and the 1st of *September*, 1842, the release made between *Muddoosoodun Sandle* of the first part, the Appellant of the second part, and one *Edward Hilder* of the third part; *Muddoosoodun Sandle*, in consideration of the sum of Rs. 25,000 paid to him by *Muttyloll Seal*, conveyed the family mansion and other real property in *Calcutta*, to the use of the Appellant, in fee. The sum of Rs. 15,000, part of the sum of Rs. 25,000, was applied in part payment of the sum of Rs. 20,000, secured by the above bond, leaving the sum of Rs. 5,000 due upon the bond, which, with the sum of Rs. 25,000, the consideration for the conveyance, made up the sum of Rs. 30,000.

Upon the occasion of the execution of this conveyance, the interest on the sum of Rs. 20,000, secured by the bond, was paid, and a receipt was given by the Appellant in the following form:—"Dear Sir, We received from you the sum of Rs. 179:7, being the amount of interest due to me upon your joint bond, up to 31st of *August* last. I am, dear Sir, yours truly, *Muttyloll Seal*.—1st of *September*, 1842. *Baboo Muddoosoodun Sandle* and *Baboo Annundochunder Sandle*."

By indenture of lease of the same date, made between the Appellant of the first part, *Muddoosoodun*

1849.

MUTTYLOLL SEAL v. ANNUNDOCHUNDER SANDLE.

Sandle, and the Respondent, *Annundochunder Sandle* of the second part, and *Edward Hilder* of the third part, *Muttyloll Seal* demised the family mansion and other real property in *Calcutta* to *Muddoosoodun Sandle* and the Respondent *Annundochunder Sandle*, for the term of three years, at the monthly rent of Rs. 425, clear of land-tax, and all other taxes and deductions whatsoever. *Muddoosoodun Sandle* and the Respondent, *Annundochunder Sandle*, by this indenture covenanted for the repairs of the premises.

Contemporaneously with the execution of this conveyance and lease, *Muddoosoodun Sandle*, and the Respondent, *Annundochunder Sandle*, also executed to the Appellant a joint and several bond in the penal sum of Rs. 50,000, conditioned for the payment of the rent, and for the performance of the covenants contained in the lease.

On the 27th of *January*, 1844, *Muddoosoodun Sandle* paid to the Appellant the sum of Rs. 5,000, on account of the Rs. 30,000, and the Appellant gave the following receipt for the same :—" Received from *Baboos Muddoosoodun Sandle* and *Annundochunder Sandle* the sum of 5,000 rupees on account.—*Muttyloll Seal.*"

The amount due to the Appellant was reduced by this payment to the sum of Rs. 25,000; and from the date of such payment the sum of Rs. 354 : 2 : 9 only was paid by way of rent under the lease, instead of the monthly rent of Rs. 425, before reserved.

In 1845, *Muddoosoodun Sandle* died intestate, leaving the Respondents his heirs and representatives, who continued to pay to the Appellant, monthly, the sum of Rs. 354 : 2 : 9, up to the 12th of *March*, 1846,

when they became desirous of obtaining a re-conveyance of the premises comprised in the indentures of lease and release, and thereupon Messrs. *Grant* and *Remfry*, the Respondents' attorneys, by their instructions, addressed to the Appellant a letter in the following terms:—"Dear *Baboo*—The *Sandles* have handed over to us Rs. 25,000 odd, to pay you the balance of your bonds and mortgage. We shall be obliged by your furnishing us with a memorandum of the amount due, when we will send it to you and receive back the deeds."

The Appellant sent no answer to this letter, but on the 31st of *March*, 1846, caused the Respondents to be served with a notice to quit the premises comprised in the deeds of conveyance, and in the lease.

The Respondents' solicitors wrote to the Appellant, tendering the principal and interest due to the Appellant, and demanded the re-delivery of the title deeds and other documents; the Appellant made no reply, but on the 15th of *April* commenced proceedings at law, by filing his plaint in covenant on the lease, on the Common Law side of the Supreme Court, against the Respondent, *Annundochunder Sandle*, as the surviving lessee.

The Respondents then filed a bill on the Equity side of the Supreme Court against the Appellant. The bill stated the several matters before mentioned, and alleged, that the transaction was a mortgage transaction, and prayed that it might be declared and decreed that the deeds of lease and release in fee, and the lease for years, were executed and delivered by *Muddoosoodun Sandle*, and by him and the Respondent *Annundochunder Sandle*, as and for a security for repayment of such loan, and advance, and in-

1849.

MUTTYLOLL SEAL v. ANNUNDO-CHUNDER SANDLE.

terest thereon, and not otherwise, and that the Respondents, as such heirs and representatives aforesaid, were entitled to redeem the messuages, lands, tenements and hereditaments therein respectively mentioned on payment of the principal money and interest due upon such loan, and that an account might be taken of what was due to the Appellant on the security for principal and interest thereof; and that the Appellant might be decreed, upon payment of what, on the taking of such account, should be found due and owing on the security, to re-assign and reconvey to the Respondents the messuages, lands, tenements and hereditaments respectively, and thereupon to deliver up to the Respondents to be cancelled the indenture of conveyance of the 31st of *August*, and 1st of *September*, 1842, and the lease for years, and the two several bonds, and to enter up satisfaction on the two judgments thereon respectively, and to deliver over to the Respondents all and every the title-deeds of the messuages, lands, tenements and hereditaments; and that the Appellant might be restrained by the order and injunction of the Court from selling, incumbering, wasting or injuring the messuages, lands, tenements or hereditaments, or conveying the same to any other person, and from further proceeding with the action of covenant.

The Appellant, by his answer, admitted that *Muddoosoodun Sandle* applied to him to lend him the sum of Rs. 30,000, on mortgage of the property in question; but he denied that he had consented to do so, and alleged and insisted, that he had become the absolute purchaser of the property. He admitted the several deeds and instruments, and the several other matters hereinbefore stated, respecting the in-

terest and rent, but failed to give any satisfactory explanation thereof; and he also admitted that, on the occasion of the execution of the deeds of conveyance and other instruments before mentioned, he had rather given *Muddoosoodun Sandle* to understand that he would, as a matter of favour, re-convey the premises, comprised in such deeds of conveyance, on such repayment as aforesaid, but he insisted that no legal obligation for him to do so ever existed, and that he considered himself discharged from any moral obligation so to re-convey by the circumstances in his answer mentioned.

Evidence was given by the Plaintiffs of the value of the premises comprised in the conveyance and lease, by which it appeared, that the premises were of greater value than Rs. 25,000, the sum advanced by the Defendant, and evidence was also entered into to show that the transaction was one of mortgage only, and not of absolute sale. Among other witnesses examined on behalf of the Defendant, was the solicitor employed by the Appellant and *Muddoosoodun Sandle* and the Respondent, *Annundochunder Sandle*, in the transactions aforesaid. He deposed that the *Sandles* conversed in English, and that the deeds were executed in his presence, that he did not know that the mutual intent and meaning of *Muddoosoodun Sandle* and the Appellant was to give and take a conveyance of the real property by way of security only; that he never understood that the deeds were intended as a security, but that he believed them to be intended as a *bonâ fide* conveyance. And he also stated that he did not, while employed as attorney in the transaction in question, understand the same to be one of loan and security, and not of sale and purchase; and that he

1849.

MUTTYLOLL SEAL v. ANNUNDOCHUNDER SANDLE.

did not know or believe that it was so understood or considered by *Muddoosoodun Sandle*, the Respondent, *Annundochunder Sandle*, and the Appellant respectively, or by any of them, except that the bond of the 13th of *August* was a temporary security for Rs. 20,000, then advanced, which was to be taken as part of the consideration for the conveyance then under preparation.

The cause was heard on the 18th and 19th of *January*, 1848, before the Supreme Court, and judgment was delivered, as follows, by the Chief Justice Sir *Lawrence Peel*:—" The instruments which were executed do not contain the whole agreement between the parties, nor does Mr. *Peard*, who prepared them, appear to have been acquainted with the whole. The bond in the penal sum of Rs. 40,000 is conditioned for the payment of the sum of Rs. 20,000, and interest at 12 per cent.; in fact, 17 per cent. was paid on this sum; and whether the additional 5 per cent. be termed commission or interest is wholly unimportant. By the original agreement between the parties, the Rs. 425 per month, reserved as rent under the lease for three years, was to be reduced on the payment of the Rs. 5,000 remaining due on the bond before mentioned; yet this important stipulation, for the reduction of the rent, is not introduced into any of the instruments. The acts of the parties satisfy us that they treated this transaction from the first as one of security, and that a power to repurchase, on the footing of a redemption, was intended to be reserved. A few days intervened between the execution of the bond and of the indentures of lease and release, and the lease for three years. Interest for these few days

was calculated and paid at 17 per cent., and not under the contract evidenced by and contained in the bond; afterwards the interest due on the Rs. 5,000, remaining due on the bond above mentioned, was blended with the rent, and this was done from the first; and when the Rs. 5,000 were paid off, the reduction took place under the original contract, and as of right, without any new negotiation or contract, yet, under the instruments executed, no such reduction could be claimed; the rent was paid as rent, and receipts were given for it as rent; but it was, notwithstanding, as to part at least, unquestionably nothing more than interest; the blending of the loan transaction with the alleged purchase transaction of the interest on that loan transaction, with the rent reservation, the exact coincidence in amount between the rent reserved and interest calculated at 17 per cent. on Rs. 30,000, the reduction of the rent in the same exact proportion, the payment of interest at 17 per cent. for the intermediate days, the abate for the four days on the payment of the Rs. 5,000, the non-application for the bond on that event, its retention, and the form of the receipt which is given on account, form, collectively, a very strong body of proof that the transaction was really in substance, whatever the form, one of security. We lay no stress on the evidence of admissions by the Defendant, on which it would be dangerous (in this country particularly) to rely. To this evidence must be added that afforded by the improbability of *Muddoosoodun* submitting to terms of so onerous a character, if it were really an out and out purchase. The evidence satisfies us that Rs. 25,000 would have been a very inadequate price for the whole property. Why, then, should the seller, selling at such undervalue, also sti-

1849.

MUTTYLOLL SEAL v. ANNUNDO-CHUNDER SANDLE.

pulate to do expensive repairs and to pay all the costs of the conveyance? No explanation is afforded of this; but if the transaction were one of security, the whole would be explained. "Under extreme pressure, indeed, *Muddoosoodun* might have entered into so improvident a contract; such pressure, however, does not appear to have existed."

By a decree of the Supreme Court, dated *January*, 1848, it was declared that the indentures of lease and release, bearing date the 31st of *August* and 1st of *September*, 1842, and the lease bearing date the 1st of *September*, 1842, and the bond of the same date, ought to stand as a security for the repayment of the sum of Rs. 25,000, together with interest for the same at the rate of 17 per cent., up to the time of the tender thereof in the pleadings mentioned, and that the Appellant should, within fourteen days from the service of the decree, re-convey and deliver to the Respondents, as such heirs and representatives as aforesaid, absolutely, the messuages, lands and premises in the indentures of lease and release mentioned, and thereby conveyed, together with all and every the title-deeds and muniments then in his possession, control or custody, and should also deliver unto the Respondents, as such heirs and representatives as aforesaid, the two several bonds, bearing date respectively the 13th of *August*, 1842, and the 1st of *September*, 1842, and the counterpart of the lease, bearing date the 1st of *September*, 1842, and that the Respondents should pay the costs of the re-conveyance.

The Appellant appealed from the whole decree.

Mr. *Wigram*, Q. C., and Mr. *Leith*, for the Appellant,

Contended, that the transaction was one of purchase,

and not of mortgage, and that the *onus* was upon the Respondents. That the case set up by them, that the deeds were controlled by a parol defeazance, was not proved, but, on the contrary, was positively denied by the evidence of the solicitor employed in the transaction. That the deeds themselves superseded any parol evidence. Stat. of Frauds (29 *Car.* II., c. 3). And upon the testimony of the witnesses as to the value of the premises comprised in the conveyance, they referred to *Small* v. *Attwood* (*a*).

Mr. *Turner*, Q. C., and Mr. *Conybeare*, for the Respondents,

Insisted, that the transaction was not an absolute sale, but was in the nature of a mortgage, giving the party a right of re-purchase, on the footing of redemption, *England* v. *Codrington* (*b*), *Williams* v. *Owen* (*c*), *Sevier* v. *Greenway* (*d*), 1 *Powell* "On Mortgages," p. 120 (*e*).

Lord LANGDALE:

In this appeal, although we think it is not without difficulty, and our opinion, if given in detail, might not have been altogether in accordance with the decision of the Court below, yet, giving our best consideration to the whole matter, we do not find any reason which appears to us sufficient to alter that decision. Under these circumstances, we must dismiss the appeal with costs.

(*a*) 1 Young, 491. (*b*) 1 Eden, 169.
(*c*) 5 Myl. & Cr. 303. (*d*) 19 Ves. 418.
(*e*) (6th Edit. by Cov.) And see *Maxwell* v. *Montacute*, Pr. Ch. 326. *Young* v. *Peachy*, 2 Atk. 258. *Walker* v. *Walker*, 2 Atk. 99; and *Clench* v. *Wetherby*, Ca. Temp. Finch, 376, in which cases defeazance had been supplied on parol evidence.

ANUND LAL SING DEO - - - *Appellant*,

AND

MAHARAJA DHERAJ GURROOD NARAYUN DEO, BAHADUR - - } *Respondent.**

On Appeal from the Sudder Dewanny Adawlut, at Bengal.

12th & 13th Feb., 1850.

A grant by a former *Raja* of *Pacheet*, of a *pergunna*, part of the *Zemindary* or *Raj* of *Pacheet*, to a member of his family, held to be a grant for maintenance only, and resumption decreed to the *Raja* in possession.

Semble: Grants made by the predecessor of the *Raja* in possession, whether in fee or for maintenance, enure only during the lifetime of the grantor, and are not binding on his successor.

THE Respondent in this case was the *Raja* of *Pacheet*, a province situate in the *Jungle mahals* of *Midnapore*; and the question in the appeal was, whether the Respondent, as the *Raja* in possession, had the right to resume a *pergunna* named *Kasaepar*, which formed part of the *Zemindary* or *Rajship* of *Pacheet*, and which had been granted by a former *Raja* of *Pacheet* to the ancestor of the Appellant.

The case of the Respondent was, that *Pacheet*, by law and the usage of the family, constituted a *Raj*, and descended entire to a single heir, to the exclusion of the other members of the family; and that a grant made by a former *Raja*, of part of the *Raj*, to a member of the family, enured only during the lifetime of the grantor, and was not binding on his successors. The Appellant denied that the *Zemindary* was a *Raj*, and as such descended entire, contending that it

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

Whether the *Zemindary* of *Pacheet* constitutes an indivisible estate of inheritance, and as such inalienable, *Quære?*

was divisible among brothers, and had been divided in the *Bengal* year 1155 (1748-9 A.D.) between *Muni Lal* and his uncle, *Mohun Lal;* that on the death of *Mohun Lal*, his brother, *Kunchun Lal*, succeeded to *Mohun Lal's* share, and that afterwards *Kunchun Lal's* only son having died, he adopted as his son *Sutroghun*, the second son of *Muni Lal*, and gave up to *Muni Lal* the whole of his share of the *Zemindary*, except *Kasaepar*, which he gave to *Sutroghun*, and that this title was confirmed by a deed executed by *Muni Lal*, the great-grandfather of the Respondent, in 1775, which was afterwards confirmed by a deed dated the 7th of *May*, 1797.

The Appellant and Respondent were both members of the *Narayun Deo* family, in whose possession the *Zemindary* or *Rajship* of *Pacheet* had remained for several generations.

It appeared from the evidence, that previously to the country in which *Pacheet* is situate becoming subject to the English Government, the affairs of the *Raj* were involved in great confusion. In 1752, one *Gurrood Narayun* was *Raja;* his eldest son, *Bheekhun Lal*, died, leaving a son named *Muni Lal*, and whilst *Muni Lal* was still a minor, family disputes took place, and *Gurrood Narayun* and most of his children were killed in a sanguinary conflict. A contest then took place for the possession of the *Zemindary*, and *Mohun Lal*, a younger son of the deceased *Raja*, sought to oust his nephew, *Muni Lal*, and usurp the *Raj* by force. *Muni Lal* was worsted in these conflicts with *Mohun Lal*, and *Mohun Lal* got possession of part of the *Raj*, and in this possession *Muni Lal* appeared to have acquiesced. In 1765, *Muni Lal* and *Mohun Lal* were both forcibly dispossessed by one *Jugut Chund.*

1850.

ANUND LAL SING DEO v. MAHARAJA DHERAJ GURROOD NARAYUN DEO.

In 1769, or the beginning of 1770, however, *Muni Lal* regained possession, and in *August*, 1770, *Mohun Lal* died without issue. *Kunchun Lal*, a younger brother of *Mohun Lal*, and uncle of *Muni Lal*, then set up a claim to a share of the *Zemindary*, and got possession of the lands held by *Mohun Lal*. In the meantime the British power had become supreme in the country, and in *September*, 1770, *Muni Lal* petitioned the Government, through the Council of Revenue at *Moorshedabad*, for redress, claiming the *Raj* as entire. This led to an investigation of his right by the British authorities; Mr. *Higginson*, the supervisor of the districts of *Beerbhoom*, being directed to inquire and report on the subject. A full inquiry was instituted, and in 1771, Mr. *Higginson* reported, that, by custom and usage, the *Raj* was indivisible, and the eldest heir alone entitled to succeed. The opinion of the *Nawab* of the *Nazim* of *Moorshedabad* on the question of the right of succession to the entire *Raj* was also obtained, which was likewise in favour of *Muni Lal's* title, and accordingly, in *March*, 1771, on the ground that the *Raj* was indivisible, and that *Muni Lal* was alone entitled to the possession, orders were issued to Mr. *Higginson* to instal *Muni Lal* in the *Zemindary*, and this was accordingly done, and he became *Raja*, with the name or title of *Raghonath Narayun*. Upon the dispossession of *Kunchun Lal* he fled to *Ramgur*; but afterwards, upon a promise of protection and a money allowance, he returned to *Pacheet*, when *Muni Lal* agreed to make a provision for the maintenance of *Kunchun Lal*, and accordingly gave him the *pergunna Kasaepar* for that purpose. About this time *Bahadur Sing*, the only son of *Kunchun Lal*, died; when *Kunchun Lal* adopted as his

son, *Sutroghun*, the second son of *Muni Lal*, to whom he granted the lands which *Muni Lal* had given him. *Kunchun Lal* entered into possession of the *pergunna*, and died in *August*, 1781, and *Muni Lal* then resumed possession of *Kasaepar*. *Muni Lal* died in 1792, and was succeeded by his son, *Bhurut Sikhur*, also called *Raja Gurrood Narayun*, the grandfather of the Respondent. He executed a deed, dated the 7th of *May*, 1797, giving *Sutroghun* possession, in these terms:—"As you have informed me that you are in possession of *pergunna Kasaepar*, under a deed granted by *Maharaja Dheraj Raghonath Narayun Deo*, my father, and *Kunchun Lal Deo*, my uncle, and that you now require a deed from me, I, therefore, give you this deed without having seen those two deeds. You may possess it according to the former deeds." *Bhurut Sikhur* afterwards attempted to take back *Kasaepar*, but *Sutroghun* continued in possession until his death. The Government revenue for the *pergunna* was always paid by the *Raja* of *Pacheet*. The affairs of the *Zemindary* were entrusted to *Sutroghun*, but by his mismanagement the revenue was allowed to fall into arrear; and amongst the other property, fifty-five villages of the *pergunna Kasaepar* were brought to sale for arrears of revenue, and sold. *Raja Gurrood Narayun* petitioned the Government for relief against these sales, as having been effected through oppression and fraud exercised towards him by the native officers of Government. An investigation took place, and a report was made, establishing the justice of the *Raja Gurrood Narayun's* complaints; and in 1799, an order was passed for reversing the sales complained of, and amongst others, the sales of the *Kasaepar* villages, and reinstating the *Raja* in the possession of his *Raj*. *Raja Gurrood Narayun* died

1850.

ANUND LAL SING DEO v. MAHARAJA DHERAJ GURROOD NARAYUN DEO.

in 1816, and was succeeded by his son, *Chyte Sing*, called *Raja Raghonath Narayun*, the father of the Respondent. In 1818, *Sutroghun* died, leaving the Appellant, his son, an infant. In that year, *Raja Raghonath Narayun* petitioned to have the *pergunna Kasaepar* delivered to him, on the ground that the *Raj* was entire, and had devolved solely on him, and that no grant made by his ancestor could be binding upon him.

In answer to this application, he was told that if he had any claim to the *pergunna*, he must institute a suit to establish his right. He died some time in 1819, without having instituted any proceedings for recovery of the *pergunna*, and was succeeded by his son, the present Respondent, who, on the 25th of *February*, 1822, filed his plaint in the Provincial Court of *Calcutta*. By the plaint he alleged, that the *Zemindary* of *Pacheet* had descended to him from sixty-eight generations, and that according to the usage of his family, the eldest son of a deceased *Raja* succeeds to the *Rajship*, and is entitled to possession of all the lands of the *Zemindary*, and household property and effects, and paying the Government revenue; while the other sons and brothers of the deceased *Raja* and their families were allowed maintenance, and remain subject and obedient to the *Raja*. He then stated, that if any *Raja*, during his *Rajship*, gave a village or *pergunna* from his *Zemindary*, at a low rent, for the support of a son or brother, and after his death his eldest son succeeded to the *Rajship*, the grant and settlement of the deceased *Raja* became null and void, and they have nothing further to do with the hereditary *Zemindary;* that according to family usage, the sale and gifts of the former *Zemindars* continue only during their *Rajship*, and are not permanent: and

that whoever becomes the *Raja* after their death has the power of confirming or annulling them, and of making a new settlement. The Respondent, by his plaint, further stated, that his great-grandfather, *Raghonath*, gave the *pergunna Kasaepar* from his *Zemindary* to his uncle, *Kunchun Lal*, in lieu of maintenance, and that the latter held it for eight years; and that after his death, in 1781-2, *Raghonath*, according to usage, resumed the *pergunna*, and included it in the *Zemindary*, and paid the Government revenue. The plaint then went on to state, that after the death of *Raghonath*, the great-grandfather of the Respondent, *Maharaja Dheraj Gurrood Narayun Deo*, succeeded to the *Rajship*, and took possession of the *pergunna* of *Kasaepar*; and he made his younger brother, *Sutroghun*, the manager of the affairs of the *Zemindary*, who for some time managed the *Zemindary*, subject and obedient to the *Raja*; though he was afterwards removed from the management of the *Zemindary* for embezzlement and fraud. The Respondent relied upon Ben. Reg. I., 1800, as decisive upon any question of joint property.

The Appellant, a minor, appeared by his guardian, and by his answer denied the allegations of the Respondent, and stated that the *Rajship* of *Pacheet* was divided into two equal parts in the *Bengal* year 1155, (1748-9), in the time of the former rulers, and they managed the affairs of their portions of the *Zemindary* for twenty-two years. That *Mohun Lal* died in the *Bengal* year 1176, and his brother, *Kunchun Lal*, got possession of his share. That disputes about the *Zemindary* arose, and the son of *Kunchun Lal*, being dead, *Kunchun Lal* chose *Sutroghun*, the second son of *Muni Lal*, as his own son, and kept only the *pergunna* of *Kasaepar* out of his own share, and gave the rest of his share of the *Zemindary* to *Muni Lal*,

1850.

ANUND LAL SING DEO v. MAHARAJA DHERAJ GURROOD NARAYUN DEO.

and the *pergunna* of *Kasaepar*, with his personal property, to *Sutroghun*, and gave him a deed for it. That *Muni Lal*, alias *Raghonath Narayun Deo*, to confirm the right of *Sutroghun*, gave him another deed for the propriety right of the *pergunna Kasaepar*, of which he has continued to have possession, and he denied the allegation of the Plaintiff, that *Raghonath Narayun Deo*, the father of his grandfather, had resumed the *pergunna* of *Kasaepar*. He also, by his answer, asserted, that *Raja Gurrood Narayun Deo*, the grandfather of the Respondent, never had possession of the *Zemindary* possessed by *Sutroghun;* but in consideration of *Sutroghun's* right, he gave him a document in the *Bengal* year 1204 (1797-8), under his own signature and the seal of the *Kazi*; and accordingly, *Sutroghun*, during his lifetime, paid the revenue for the *pergunna* of *Kasaepar*, with that of the *Zemindary*, to the grandfather and father of the Plaintiff, and after their deaths to the Plaintiff himself. And he further denied the allegation, that the *Raja* had not power to make a grant for any longer period than his own life, asserting that the grants made by the ancestors of the Plaintiff in former times had been confirmed and continued after their death; and he insisted that, as seventy years had elapsed since the alleged division of the *Zemindary*, and that as the *pergunna* had regularly descended to the Defendant's ancestors, as proprietors, without any claim, the Plaintiff's claim was barred.

The Respondent, in his replication, insisted upon the allegation contained in his plaint, that the *Zemindary* had never been divided, and that it had been the ancient family usage of this *Rajship*, that the eldest son of the deceased *Raja* became the *Raja*. He gave a long account of the disputes and contests which had

taken place respecting the *Zemindary* since the year 1754-5. He further alleged, that it was a mere fabrication to state that a deed was given in 1773 by *Kunchun Lal*, and contended that the deed dated the 7th of *May*, 1797, alleged to have been given by his grandfather, was unworthy of credit. He admitted that a deed, granting *pergunna Kasaepar* to the father of the Appellant, had been executed by his grandfather, and he gave the following explanation of the fact. He said that his grandfather had made the Appellant's father manager of all the affairs of the *Zemindary*, but, in consequence of misconduct, he subsequently dismissed him and took the *pergunna* under his own management; that many false suits were instituted against the *Raja*, and he was imprisoned, and the whole *Zemindary* was in danger of being sold in parcels by the litigant parties. That the father of the Defendant induced his grandfather to make a grant of the *pergunna* of *Kasaepar* to him, to save the entire *Zemindary* from ruin. He relied upon Ben. Reg. X., 1800, respecting indivisible estates, in support of his claim to resume the *pergunna*.

The Appellant, having attained his majority, put in a rejoinder in person, and insisted that, when disputes arose between *Muni Lal* and *Mohun Lal*, the *Zemindary* was divided, and there was then no custom to prevent its division.

The evidence was conflicting. On the part of the Respondent, evidence was given that, according to law and usage the *Zemindary* of *Pacheet* was descendible as an entire *Raj*, to a single heir; that a grant by a *Raja* was not binding on his successor, but might be resumed; that on the death of *Kunchun Lal*, in 1781, *Raja Raghonath Narayun*, the great-grandfather of the Respondent, entered into possession

1850.

ANUND LAL SING DEO v. MAHARAJA DHEKAJ GURROOD NARAYUN DEO.

of the *pergunna* in dispute, and that the deed of the 7th of *May*, 1797, declaring that *Sutroghun* was to hold for life only, was duly executed. On the part of the Appellant, evidence was adduced to show that the *Zemindary* was a divisible inheritance, and had been divided between *Muni Lal* and *Mohun Lal*; he put in evidence a deed, dated the 26th of *July*, 1775, from *Raghonath Narayun Deo* to *Kunchun Lal*, granting *Kunchun Lal* the *pergunna Kasaepar*, and giving his second son, *Sutroghun*, for adoption, and examined witnesses to show that *Sutroghun* had succeeded to the *pergunna* in dispute, by inheritance.

The suit was brought in the first instance before Mr. *Walpole*, the second judge of the Provincial Court, but no decision was given by him, the suit being referred to Mr. *James Curtis*, the fifth judge. He, on the 27th of *February*, 1829, delivered judgment, and decreed the Plaintiff's claim to be dismissed, declaring that the *pergunna* in dispute was the hereditary property of *Sutroghun*, and that the possession of the Defendant and his ancestors had been by proprietary right before the Company's Government, and that the Plaintiff's claim to the hereditary property of the Defendant could not be admitted or heard under any Regulation; that his claim was unfounded and improper, and, therefore, ordered that the case be dismissed with costs, and the Defendant to be in possession of the *pergunna*.

The Respondent appealed from this decision to the *Sudder Dewanny Adawlut*, at *Bengal*, and filed, on the 7th of *February*, 1833, his reasons of appeal against the Provincial Court's decree, contending, that it was contrary to evidence and the family usage; he also filed further documentary evidence to prove such usage. The appeal came on for hearing before Mr.

R. H. Rattray, one of the Judges of the *Sudder Dewanny* Court, who, on the 26th of *March*, 1833, pronounced the decree of the Court, which concurred with the opinion of the Provincial Judge, and ordered that the claim and appeal of the Appellant should be dismissed, and the decision of the *Calcutta* Provincial Court affirmed, with costs.

The Respondent presented a petition to the *Sudder* Court, praying for a review of judgment, submitting that the decree was contrary to the provisions of the Ben. Reg. X. of 1800 (*a*), and the law and the usage of the family. He also petitioned the Governor-General of India on the subject of the *Sudder* Court's decree, alleging, that such decree was opposed to the established usage of the country in which the *pergunna* was situate.

(*a*) Regulation X. of 1800 recognises the custom of indivisible estates of inheritance in the *Jungle mahals*.

Section I. enacts, that "By Regulation XI. of 1793, the estates of proprietors of land dying intestate, are declared liable to be divided among the heirs of the deceased, agreeably to the Hindoo or Mahomedan laws. A custom, however, having been found to prevail in the *jungle mahals* of *Midnapore* and other districts, by which the succession to landed estates invariably devolves to a single heir, without the division of the property, and this custom having been long established, and being founded in certain circumstances of local convenience, which still exist, the Governor-General in Council has enacted the following rule, to be in force in the provinces of *Bengal*, *Behar* and *Orissa*, from the date of its promulgation.

"Sect. II. Regulation XI. 1793, shall not be considered to supersede or affect any established usage which may have obtained in the *jungle mahals* of *Midnapore* and other districts, by which the succession to landed estates, the proprietor of which may die intestate, has hitherto been considered to devolve to a single heir, to the exclusion of the other heirs of the deceased. In the *mahals* in question, the local custom of the country shall be continued in full force as heretofore, and the Courts of Justice be guided by it in the decision of all claims which may come before them, to the inheritance of landed property situated in those *mahals*."

1850.

ANUND LAL SING DEO v. MAHARAJA DHERAJ GURROOD NARAYUN DEO.

An official inquiry was made in the Government offices, to ascertain what records were in existence concerning the proceedings of 1771, whereby the hereditary right of *Muni Lal* to the *Zemindary*, as an indivisible *Raj*, had been investigated. The consequence of these inquiries was, that additional documents, relative to the proceedings of 1771, were produced, showing the investigation which had then taken place, and the decision which had been then come to in favour of the rights of *Muni Lal;* some additional precedents of decisions supporting the Respondent's claim to succeed to the entire *Raj* were also produced.

By an order of the *Sudder* Court, bearing date the 25th of *May*, 1837, it was ordered, that a review of the case should be admitted, and the case restored to its former number.

The review being admitted, the appeal, with the further evidence, came on again before Mr. *R. H. Rattray*, and that Judge was of opinion that his former decision ought to be reversed. In giving judgment, on the 21st of *August*, 1838, he said, "As it appears by the letter of Mr. *Alexander Higginson*, supervisor of the districts of *Beerbhoom*, and others, to the Council of *Moorshedabad*, dated the 21st of *January*, 1771, and especially by the opinion of the deputy minister of the *Nazim* of *Moorshedabad*, regarding the *Zemindary* of the *chukla* of *Pacheet*, and by the letter of the Council of *Moorshedabad*, which was sent with the order of the deputy minister, that *Muni Lal* had absolute possession of the *Zemindary* of *Chukla Pacheet*, and that a maintenance was allowed to *Kunchun Lal*, as being a descendant of the younger brother, and that the expenses allowed to *Kunchun Lal* for his possession and management of the *chukla* of *Pacheet* was discontinued, which removes the plea

of the Defendant that the *Zemindary* was divided between *Muni Lal* and *Mohun Lal* in the *Bengal* year 1155, and that after the death of *Mohun Lal* the half of the *Zemindary* went to *Kunchun Lal*, and that *Sutroghun* got a gift of the *pergunna* from *Kunchun Lal*, and afterwards from *Bhurut Sikhur*, alias *Raja Gurrood Narayun*, in the *Bengal* year 1204, and the Defendant has no further right to the *pergunna* by inheritance or by gift; for if the father of the Defendant had really possession of the property in dispute by right of inheritance, there was no need of taking a gift of it, and if the *Raj* and *Zemindary* had been divided between *Muni Lal* and *Mohun Lal*, a separate contract would certainly have been made by the *Nazim* of the province or the Company's Government with each of them, which was not done." He then proceeded, "The Defendant pleads the limitation of time, which deserves no attention, as it is not applicable to this case, for it appears by the papers of the case that the property in dispute was given for the maintenance, and by the family usage the new *Raja* has the power of continuing or resuming it, and if any *Raja* had not resumed it, he had the power of continuing it by the family usage; and the limitation of time cannot be applied to the proprietary right of the Defendant, and this suit was instituted within a short time after the death of *Sutroghun:*" and he directed that the papers in the suit should be laid before another Judge.

The case accordingly came before Mr. *Abercrombie Dick*, another of the Judges of the *Sudder* Court, who differed from Mr. *Rattray*, and was of opinion that the decision of the Provincial Court of *Calcutta*, and the former decision of the *Sudder* Court was proper, and should be affirmed. He gave his judgment on the

1850.

ANUND LAL SING DEO v. MAHARAJA DHERAJ GURROOD NARAYUN DEO.

2nd of *December*, 1839, as follows:—"It clearly appears by the English papers received, that *Muni Lal*, alias *Raja Raghonath Narayun*, got orders for the entire *Zemindary* from Government and the *Nawab*, and for a monthly allowance to be made to *Kunchun Lal*; but although every search has been made, no such document has been found to show that *Raja Raghonath Narayun* obtained possession of the entire *Zemindary*, or that *Kunchun Lal* received his allowance. On the contrary, it is quite clear by the documents produced by the Defendant, that after getting the order, *Raghonath Narayun* agreed to leave to *Kunchun Lal* the *pergunna* of *Kasaepar*, and *Kunchun Lal* to give up the rest of his *Zemindary* to *Muni Lal*, which was done. It is, therefore, my opinion that this claim of the Plaintiff is not connected with family usage, and the Plaintiff is not competent to annul an adjustment made between those two which has continued so long a time merely upon family usage, which has nothing to do with this case, and I, therefore, think that the claim of the Plaintiff should not be admitted, and that the decision of the Provincial Court and former decision of this Court, should be affirmed."

The Court being thus divided in opinion, it became necessary to resort to a third Judge, and the case came before Mr. *Lee Warner*, who, on the 24th of *February*, 1840, pronounced the final decree in the cause, by which, concurring with Mr. *Rattray*, he decreed the appeal and reversed the previous decisions of the Provincial and *Sudder* Courts. The principal part of his judgment was in these terms:—"It is my opinion, that the claim of the Plaintiff, for the reasons hereinafter given, is in every respect correct, for one of the reasons of Mr. *James Curtis*, Judge of

the Provincial Court, stated in his decision of the 27th of *February*, 1829, is, that in the year 1155, the *Zemindary* of *Pacheet* was divided between *Muni Lal* and *Mohun Lal* by *Mookund Deo*, the *Zemindar* of *Ramgur*, in half-shares, by which the family usage that the *Zemindary* is not divided has not been proved; but when the Company's Government was established, it appears that, on the 4th of *May*, 1771, *Raja Raghonath Narayun* was put in full possession of his *Raj* by the order of the then Government, and of the *Zemindary*; and before that he had an order of the *Nawab* and the usual investiture, and the petition which the agent of *Kunchun Lal* presented, that the half of the *Zemindary* was his right, and that *Muni Lal Raghonath Narayun Deo* had forcibly taken it, was rejected; and he was informed that if he would go to *Pacheet* he would get a proper allowance, as he was a descendant of a younger brother of the family, by which the division of the *Zemindary* between *Muni Lal* and *Mohun Lal* was annulled, and the entire *Zemindary* was restored to the *Raja*. The ground of the Judge of the Provincial Court on this point is defective and unavailing. Regarding the second ground, on the limitation of time, that after such long possession the case cannot be admitted by the Court, under Reg. III. of 1793, and sec. iii. Reg. II. of 1805, as stated in his decision, it is necessary to consider the claim in this case, whether, by the order of the 9th of *December*, 1818, it is really the time of dispossession or not; but as the suit originated in the order of the Collector to appoint a guardian and to institute the suit, and there was no dispute before that for the *talook* in dispute, which was given for maintenance, and the former *Rajas* had the power of confirming or resuming it by

1850.

ANUND LAL SING DEO v. MAHARAJA DHERAJ GURROOD NARAYUN DEO.

the family usage, the time should be reckoned from the date of the Collector's order which gave rise to the claim, and it is clear that the suit of the Plaintiff, Appellant, has therefore been instituted within the prescribed time; moreover, the possession of the Respondent and his ancestor was only for maintenance, and not for money or any other consideration to give a proprietary possession: it is, therefore, necessary to ascertain whether this *pergunna* was given for maintenance or acquired by inheritance without the consent or confirmation of the *Rajas*. It certainly appears by the English letter and inquiries of 1771, and of the agent of the Governor-General at *Hazaribaugh*, which were made by order of the Government, into the usages of this family, that the eldest son becomes the *Raja*, and gets full possession of the entire *Zemindary*, and the other sons and heirs have a maintenance. There is, therefore, no doubt that the *pergunna* in dispute is included in the *Zemindary*, and the Defendant can have no hereditary right, although before the Company's Government there were frequent transfers and contentions. It is not necessary to inquire into them; the order of the 4th of *May*, 1771, is sufficient and conclusive for the trial of this case."

From this final decree, the present appeal was brought, and now came on for hearing.

Mr. *Turner*, Q. C., Mr. *Forsyth*, and Mr. *Maule*, for the Appellant,

Contended, that the hereditary right of the Appellant to the *pergunna* through *Kunchun Lal* was proved, denying that it was the custom or usage of the family that a single heir should succeed to the entire *Zemindary*, or that the *Zemindary* was inalienable, and sub-

mitted, that such custom, if it formerly existed, had been infringed by the division of the *Zemindary* between *Muni Lal* and *Mohun Lal*. That the grant of the *pèrgunna* to *Kunchun Lal*, and confirmed to *Sutroghun*, was in fee, and did not terminate with the life of the grantor, and was not liable to resumption or annexation to the *Zemindary* by the Respondent as the reigning *Raja;* though if such grant was for maintenance only, it might have been resumable. That as the Appellant and his ancestors had been so long in possession, the *onus probandi* was upon the Respondent to prove the custom to resume.

Mr. *Wigram*, Q. C., Mr. *Lloyd*, Q C., and Mr. *Edmund F. Moore*, for the Respondent,

Submitted, First, that the *pergunna* in question formed part of *Pacheet*, which was a *Raj* and indivisible, descending entire to a single heir to the exclusion of the rest of the family, and that, according to the entailed character of the *Raj*, like a Scotch entail, was not barrable. Second, that the only title of the Appellant's father to the *pergunna* was under a deed of gift and provision for life, which did not enure beyond the lifetime of the grantor. Third, that, according to the law and usage of the family, it was not competent for any former *Raja* to bind his successors by a permanent grant of property belonging to the *Raj*, and even if such grant had been in fee, being made by a former *Raja*, it was not binding on the Respondent, and was resumable by him. Fourth, that, according to the provisions contained in the deed of the 7th of *May*, 1797, the *pergunna* reverted, on the death of the Appellant's father, to the *Raj*.

1850.

ANUND LAL SING DEO v. MAHARAJA DHERAJ GURROOD NARAYUN DEO.

The authorities referred to upon the question of *Pacheet* being a *Raj* and inalienable, were Ben. Regs. XI. of 1793 and X. of 1800; 1 *W. Macnaghten's* Principles of Hindoo Law, 7; 1 *Strange's* Hindoo Law, 198, 208 (2 Edit.); and *Raja Deedar Hossein* v. *Ranee Zuhoor-oon-Nissa* (*a*).

Judgment was delivered by

Lord LANGDALE:

22nd Feb., 1850.

In this case, an action was brought in the Provincial Court of *Calcutta* by the Respondent, *Maharaja Dheraj Gurrood Narayun Deo*, against the Appellant, *Anund Lal*, to recover from him the possession of the *pergunna* of *Kasaepar*, part of the *Zemindary* of *Pacheet*, situate in the *Jungle mahals* in the Presidency of *Bengal*.

By the decree of Mr. *James Curtis*, made in the Provincial Court, on the 27th of *February*, 1829, it was ordered, that the case should be dismissed, that the Defendant (the Appellant, *Anund Lal*) should be in possession of the *pergunna* in dispute, and that all the costs of the Court should be charged to the Plaintiff. From this decree the Respondent presented an appeal to the *Sudder Dewanny* Court at *Calcutta*, and on the hearing by Mr. *Rattray*, on the 26th of *March*, 1833, it was adjudged, that the decision of the Provincial Court was in every respect just and proper. The exceptions of the Plaintiff (the now Respondent) were held to be vain, his claim and appeal were dismissed, and the decision of the Provincial Court was affirmed. After this the Respondent presented a petition for review of judgment, and the petition having been granted, the cause was again heard by Mr. *Rattray*, on the 21st of *August*, 1838; the Re-

(*a*) 2 Moore's Ind. App. Cases, 441

spondent then produced several additional documents, and it was held by Mr. *Rattray*, that the documents produced by the Plaintiff proved his claim, and thereupon Mr. *Rattray* decreed that his former decision should be reversed; but the concurrence of another Judge being necessary, under the circumstances, he ordered the papers to be laid before another Judge, to pass a final order. The case was afterwards brought before Mr. *Abercrombie Dick*, another Judge of the *Sudder Dewanny* Court, at *Calcutta*, and on the 2nd of *December*, 1839, he held, that the claim of the Plaintiff ought not to be admitted, and that the decision of the Provincial Court, and the first decision of Mr. *Rattray*, should be affirmed. In consequence of this difference of opinion, it was ordered, that the papers should be laid before another Judge to pass a final order. Under these circumstances the case was again heard before Mr. *Edward Lee Warner*, who concurred with Mr. *Rattray* in the opinion recorded by him on the 21st of *August*, 1838, and differed from Mr. *Dick* in his opinion recorded on the 11th of *September*, 1839, and finally ordered, that the claim and appeal of the Plaintiff should be decreed, that the former decree of the *Sudder Dewanny* Court, dated 26th of *March*, 1833, which affirmed the decision of the *Calcutta* Provincial Court, should be reversed, and that the Plaintiff should be put into possession of the property in dispute, and the costs of the Court. It is from this decree that the present appeal to Her Majesty in Council is presented by *Anund Lal*, the Defendant in the cause below, and now the Appellant.

It appears that the family of *Narayun Deo* had in some way had possession of the *Rajship* and *Zemindary* of *Pacheet* for several generations, and that for several

1850.

ANUND LAL SING DEO v. MAHARAJA DHERAJ GURROOD NARAYUN DEO.

years before the year 1769, the possession had been the subject of great and violent contention, amounting to actual war between the different members of the family. *Muni Lal* was the eldest son of the eldest branch. He had two uncles, *Mohun Lal* and *Kunchun Lal*. *Mohun Lal* had possession of and claimed to be entitled to part of the *Zemindary*, or the part of the lands comprised in the *Zemindary*. Upon his death, in 1769, his brother, *Kunchun Lal*, became possessed of such part of the *Zemindary* or land as had been possessed by *Mohun Lal*, and in 1770, *Muni Lal*, as *Zemindar*, complained to the Council of Revenue of *Moorshedabad*, that he had been forcibly dispossessed of his *Zemindary*; that, after expelling one member of his family, he had got possession of part of the *Raj* and *Zemindary*, but that *Mohun Lal* had also a part, and after his death, *Kunchun Lal* had been in possession of some *pergunnas* of the *Zemindary*, and intended taking more. He stated, that by the ancient custom of the family for many generations, after the death of the *Raja*, the eldest son succeeded him, and the other sons had a maintenance for life, and that the *Zemindary* was never divided. He therefore prayed that the family usage of the *Zemindary* might be inquired into, and that he might be ordered to be put into possession of the whole *Zemindary*.

In consequence of this complaint and request, an inquiry was instituted and a report made, and in the result, and on the 7th of *March*, 1771, the Council of Revenue concluded, or came to the determination, that the succession to the whole *Zemindary* devolved by inheritance to the *Raja Muni Lal*, and that *Kunchun Lal* (his uncle) ought to have a reasonable and equitable allowance for his subsistence, which, in right

of his being descended from a junior branch of the family, was secured to him by a clause in the *sunud*.

The *Naib Dewan's perwanna* of investiture was obtained and sent to Mr. *Higginson*, the supervisor of *Pacheet*, who was desired to instal *Muni Lal* in the *Zemindary*, and in *May*, 1771, Mr. *Higginson* installed him in the whole *Zemindary*, and delivered to him the *Nawab's perwanna*, and the customary *khilate* on the occasion. *Kunchun Lal*, on hearing that he was deprived of his share of the *Zemindary* which he had possessed (which Mr. *Higginson* calls the half of the *Zemindary*), retired to *Ramgur*, and was invited to return, with a promise of protection and the enjoyment of a monthly allowance for himself; with this he does not appear to have been at first contented, for, on the 15th of *June*, 1772, he complained, by his *vakeel*, that he had been supplanted in his division of the *Zemindary*, and he prayed that he might be restored to his *Zemindary;* he was answered, that if he would return to *Pacheet*, an equitable and reasonable allowance would be granted to him for his subsistence, as was due to him by a clause in the *sunud*.

Soon after this *Bahadur Sing*, the only son of *Kunchun Lal*, died, and in *August*, 1773, *Kunchun Lal* adopted as his son, *Sutroghun* (the second son of the *Raja Muni Lal*), and committed to him what is called the whole property, during the life and after the death of *Kunchun Lal*.

No contemporaneous instrument, executed by *Muni Lal*, is produced; but the *pergunna* of *Kasaepar* being within or part of the *Zemindary* of *Pacheet*, some arrangement was entered into between *Muni Lal* and *Kunchun Lal*, and a deed is produced, dated the 26th of *July*, 1775, by which *Muni Lal* is alleged to have agreed as follows:—"As my uncle, *Kunchun Lal*, has

1850.

ANUND LAL SING DEO v. MAHARAJA DHERAJ GURROOD NARAYUN DEO.

relinquished his half of the *Raj*, and come to terms with me, I have given the *pergunna* of *Kasaepar* to him, and as he has no son, he has asked me to give him *Mudhun Lal* (another name for *Sutroghun*), whom he would adopt, and keep as his son; I have, therefore, according to the request of my uncle, given him *Mudhun Lal*, in the presence of [the persons named in the deed], in whose presence he has given the entire *pergunna* and all his property to *Mudhun Lal*, and also have given the *pergunna* and entire property of my uncle to *Mudhun Lal*."

The question in this cause depends entirely on the title which *Kunchun Lal* had or obtained to the *pergunna* of *Kasaepar*.

The Appellant alleges, that the *Raja* had a right to alienate any part of the *Zemindary*; and that *Kunchun Lal*, even if he had no previous right to *Kasaepar*, acquired a right to it by the deed of the 26th of *July*, 1775, and that the circumstances under which *Kunchun Lal* had possessed a portion of the *Zemindary* were such, that the relinquishment of his claim to it was a sufficient consideration, if any consideration were required, for the grant to him of the *pergunna* of *Kasaepar*.

The Respondent, on the other hand, contends, that the *Zemindary* was indivisible or inalienable, and consequently, that *Muni Lal* was incapable, for any consideration, to transfer any portion of it to *Kunchun Lal*, so as to bind his successor in the *Zemindary*; he further insists, that *Muni Lal* did not attempt to make an absolute gift of *Kasaepar* to *Kunchun Lal*, but gave it to him only for the maintenance, or part of the maintenance, to which he was entitled from the *Raja*, and that the gift (being only for maintenance) could have no binding effect against the successor of the *Raja*.

The Appellant admits that a grant for maintenance ceases with the life of the grantor; and he relies on the power of the *Raja* to alienate, and the actual alienation which he says was made, and, under these circumstances, the title of the Plaintiff fails in either case; first, if the *Raja* was incapable of alienating any part of the *Zemindary*, or, secondly, if the grant of *Kasaepar* was for maintenance; and as it appears to us, that the inalienability of the *Zemindary* has not been sufficiently established, it is necessary for us to consider, whether or not the grant of *Muni Lal* of *Kasaepar* to *Kunchun Lal* was for maintenance? If it was, the Appellant has no title to it.

We consider, that by the proceedings in 1770 and 1771, from which *Kunchun Lal* in vain attempted to obtain relief in 1772, it was clearly established that *Muni Lal* was entitled by inheritance to the whole *Zemindary*, and that his uncle, *Kunchun Lal*, was intitled to an equitable and reasonable allowance, to be granted to him for his subsistence. It was in this state of their respective rights, that the transaction of 1773, or of 1773 and 1775, took place. It may be questionable whether the deed of the 26th of *July*, 1775, is genuine; but supposing it to be so, *Muni Lal* thereby gave the *pergunna* of *Kasaepar* to *Kunchun Lal*, without making any mention of maintenance, and the circumstances of the case were such that there might have been an intention to give more than maintenance, and that for valuable consideration. Nevertheless, there is nothing in the deed to prove that in this gift of the *pergunna* of *Kasaepar*, more than a provision for maintenance was intended, and documents of a subsequent date appear to us to show satisfactorily that no more was intended.

Kunchun Lal died about 1781, and was succeeded

1850.

ANUND LAL SING DEO v. MAHARAJA DHERAJ GURROOD NARAYUN DEO.

by his adopted son, *Sutroghun*, the second son of *Muni Lal*. *Muni Lal* died in 1792, and was succeeded in the *Zemindary* by his eldest son, *Bhurut Sikhur*. If the grant of *Kasaepar* to *Kunchun Lal* had been a valid permanent grant, *Sutroghun* was entitled to it without any re-grant or confirmation by *Bhurut Sikhur;* but on the 7th of *May*, 1797, as he says, without having seen the former deed, *Bhurut Sikhur* executed a new deed, authorising *Sutroghun* to possess *Kasaepar*, according to the former deeds. This deed is quite consistent with the supposition that the former deed was a grant for maintenance, but inconsistent with the supposition that the former deed was absolute.

We do not think that the least credit is due to the deed of contemporaneous date alleged to have been executed by *Sutroghun* to *Bhurut Sikhur*.

It appears by the report of Mr. *Vander Hayden* (in *January*, 1799), that the country was in a very unsettled state, that *Bhurut Sikhur* was in very great pecuniary difficulties; and proceedings were adopted to set aside sales which were supposed to have been improperly obtained from him. And some disputes were subsisting between *Sutroghun* and *Bhurut Sikhur*, respecting the payment of so much of the revenue of the *Zemindary* as was due from *Sutroghun*, in respect of *Kasaepar*, part of the land within the *Zemindary*, to *Bhurut Sikhur*, by whom the revenue of the whole *Zemindary* was payable to Government, and also in respect of a money allowance for maintenance, which *Sutroghun* claimed to be due to him from *Bhurut Sikhur*.

On the 15th of *August*, 1803, *Sutroghun* presented a petition to the Governor, in which he complained of *Bhurut Sikhur;* that he had stopped an allowance in cash made to him by deed; besides which, he, *Sutroghun*, had the *pergunna* of *Kasaepar* for his mainte-

nance; and that *Bhurut Sikhur* had made a grant of that *pergunna* given for his maintenance to the son of his eldest son. He alleged further, that he was enjoying *Kasaepar* as a maintenance from his father and his uncles (*Muni Lal* and *Kunchun Lal*), and that the *Raja*, his brother (*Bhurut Sikhur*), when he succeeded to the *Raj*, gave him a deed, under his seal and signature, confirming the former deed, and had it registered; yet he was prepared to take the law into his own hands and eject the petitioner from the *pergunna*. Upon this petition *Bhurut Sikhur* was ordered to report in twelve days; what was done upon it does not appear; but it seems that *Sutroghun* was, for that time, quieted in his possession of *Kasaepar*, for, in *November*, 1804, he presented another petition, in the commencement of which he states, that he was well by favour of the magistrates, to whom it was addressed; and that the *pergunna* of *Kasaepar* was for his maintenance, and that he had enjoyed it by paying the Government revenue to the *Raja* annually; and again complaining, that the *Raja* evaded payment of his annual allowance, and also intended to take possession of the *pergunna* again; this petition was also referred to the *Raja* to report, and we have no account of what was done upon it; but it seems that *Sutroghun*, not receiving his money allowance from the *Raja*, neglected to pay to the *Raja* the contribution due for *Kasaepar* to the revenue of the *Zemindary*, payable by the *Raja*, and an offer was made to *Sutroghun* to have *Kasaepar* excluded from the *Zemindary*, and entered in his own name, if he agreed to it. The dispute was continued, and was explained by a statement of Mr. *Impey*, the assistant collector at *Bancoorah*, made on the 9th of *April*, 1810.

1850.

ANUND LAL SING DEO v. MAHARAJA DHERAJ GURROOD NARAYUN DEO.

Bhurut Sikhur died in 1810, and was succeeded by *Chyte Sing*, who died in 1819, and was succeeded in the *Zemindary* by the Respondent.

Sutroghun Sing died in 1818, and was succeeded by the Appellant.

The dispute which subsisted between *Bhurut Sikhur* and *Sutroghun* continued between the Respondent and the Appellant.

And the question, as has been stated, is, whether *Sutroghun* was entitled to *Kasaepar* absolutely, or only for his maintenance? And having regard to the respective claims of *Muni Lal* and *Kunchun Lal*, in 1770, to the proceedings of the Council of Revenue, the deeds of 1773 and 1775, the confirmation of the grants of 1775 by the deed of 1797, and the distinct statements and admissions made in 1803 and 1804 by *Kunchun Lal*, we are of opinion, that *Kunchun Lal* was entitled to *Kasaepar* only for his maintenance, and consequently, that the *Raja* (the Plaintiff in the cause below, and now the Respondent) was entitled to recover possession.

We shall, therefore, humbly report to Her Majesty that the appeal ought to be dismissed, and the decree of the 24th of *February*, 1840, affirmed; but considering the great length of time during which the Appellant continued in possession of the *pergunna* in question, and the several decisions which have at different times been pronounced in his favour, it appears to us, that we may, without impropriety, recommend the dismissal of the appeal without costs.*

* This case is reported in the 6th Ben Sud. Dew. Rep., p. 282, nom. "*Unund Lal Sing* v. *Maharaja Gurundnarain Deo.*" See also *Beebee Punchurn Koomaree* v. *Maharaja Gurundnarain Deo*, (6 Ben. Sud. Dew. Rep., p. 140,) and *Mussummant Mahranee* v. *Benee Pershad Rai* (4 Ben. Sud. Dew. Rep., p. 62).

RAJA SUTTI CHURN GHOSAL - - *Appellant,*

AND

SRI MUDDEN KISHORE INDOO - *Respondent.**

On Appeal from the Sudder Dewanny Adawlut at Bengal.

12th Feb., 1850.

Petition to dismiss an appeal from the *Sudder* Court in *India*, and for an Order directing that Court to carry into execution the terms of a deed of compromise, upon which the withdrawal of the appeal was founded, refused.

THIS was a petition to dismiss an appeal. The parties executed, in *India*, a *razinamah* (deed of compromise), for the settlement of their respective claims, the subject of the cause, and for the withdrawal of the appeal, upon certain conditions specified therein, which respected the taking the accounts of the *wasilat*, or mesne profits. The petition, besides praying for the withdrawal of the appeal, prayed, that directions might be given to the *Sudder Dewanny* Court to carry into effect the terms of the deed of *razinamah*.

Mr. *Turner*, Q. C., in support of the Petition.

Mr. *Wigram*, Q. C., for the Respondent.

All this Court will do, in such circumstances, is to make an Order of dismissal, reserving to the parties leave to apply to the Court in *India*, to take further proceedings in pursuance of such agreement.

Their Lordships granted leave to withdraw the appeal, but refused to make an Order directing the *Sudder Dewanny* Court to carry into execution the terms of the deed of *razinamah*; leave being reserved to the parties to apply to the Court below, to take further proceedings under such agreement.

* Present: Members of the *Judicial Committee*,—Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

1850.

RAJA SUTTI CHURN GHOSAL v. SRI MUDDEN KISHORE INDOO.

The following Order in Council was made upon the Petition:—

"Her Majesty, having taken the said report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order, as it is hereby ordered, that the said appeal be, and the same is hereby, dismissed, with leave to the parties to apply to the said Court of *Sudder Dewanny Adawlut*, to take further proceedings in pursuance of the said agreement, whereof the Judges of the Court of *Sudder Dewanny Adawlut*, at *Fort William*, in *Bengal*, for the time being, and all other persons whom it may concern, are to take notice, and govern themselves accordingly."

DOOLUBDASS PETTAMBERDASS and others - - - - - } *Appellants*,

AND

RAMLOLL THACKOORSEYDASS and others - - - - - } *Respondents*.*

On Appeal from the Supreme Court of Judicature at Bombay.

27th & 28th June, 1850.

Wager contracts between the Plaintiffs and Defendants upon

THIS was an action on promises brought by the Respondents, *Ramloll Thackoorseydass*, *Luckinschund*

* Present: Members of the *Judicial Committee*,—Lord Langdale, Mr. Baron Parke, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

the price that *Patna* opium would fetch at the next Government sale at *Calcutta*; each party knowing that the other might use means to enhance or depress such price. Held, that the bidding at the sale by one of the Plaintiffs, though done colourably, and as it appeared only to enhance the price, was no fraud on the Defendants, or upon the public, as he had a right in common with all the world to bid at such sale, and was not precluded from recovering the amount of such wager contracts by the fact, that such bidding tended to bring about the event by which the wager was to be won.

Held also, that employing agents at such sale (all of whom were cognizant that the object was to enhance the price of opium sold) to bid, there being no *crimen falsi* committed, did not constitute an illegal conspiracy, or such fraud as would vitiate the wager contracts.

The common law offence of engrossing or regrating applies only with respect to the necessaries of life.

By the 6th Article of the Convention between *Great Britain* and *France*, the French Government had a right to demand, out of the quantities sold at the Government sale, 300 chests of opium at the average rate of sale. Held, that no fraud on the vendors was committed by inducing the French Consul to exercise that option in favour of the Plaintiffs.

After the contracts were entered into, and an action commenced in the Supreme Court, wager contracts were declared invalid by the Act of the Indian Legislature, No. 21 of 1848, which enacts "that all agreements, whether made in speaking, writing, or otherwise, by way of gaming or wagering, shall be null and void, and no suit shall be allowed in any Court of Law or Equity for recovering any sum of money or valuable thing

1850.

DOOLUBDASS PETTAMBERDASS and others v. RAMLOLL THACKOORSEYDASS and others.

Munneeram, and others, trading in *Bombay*, in the name and firm of "*Ragoonathdass Ramloll*," against the Appellants, *Doolubdass Pettamberdass*, *Lellachund Pettamberdass*, *Ambaram Pettamberdass*, and *Jetta Pettamberdass*, trading in *Bombay* under the name and firm of "*Doolubdass Pettamberdass*," to recover the amount of forty-five wager contracts made between the Plaintiffs and Defendants in *October*, 1846, on the average price of *Patna* opium at the next Government sale at *Calcutta*. The parties were Hindoo merchants and bankers at *Bombay*.

The plaint contained forty-five counts. The first count stated, that on the 20th of *October*, 1846, in consideration that the Plaintiffs, at the request of the Defendants, then promised to pay the Defendants within a reasonable time after notice of the first public sale of opium to take place at *Calcutta*, next, after the making of the said promise, such a sum of money as should be equal to five times the amount of the difference between the average price of one chest of *Patna* opium of the opium to be sold at such first public Government sale (to be calculated according to the actual price which the whole amount of *Patna* opium, which should be sold at such first public Government sale, should be sold for and realize), and the sum of Rs. 1,386 if such average should be less than the sum of Rs. 1,386 per chest, the Defendants

alleged to be won on any wager, or intrusted to any person to abide the event of any game, or on which any wager is made."

Held, that this Legislative Act did not affect existing contracts, or actions already commenced upon such contracts; there being no words in the Act sufficient to show the intention of the Legislature to affect existing rights.

Statutes are, *primâ facie*, deemed to be prospective only, "*Nova constitutio futuris formam imponere debet, non præteritis.*"

Moon v. *Durden* (2 Exch. Rep. 22) approved of.

The case of *Levi* v. *Levi* (6 Car. & Pay. 239), observed upon and questioned.

promised to pay the Plaintiffs within a reasonable time, after notice of such first public Government sale of opium, at *Calcutta*, such sum as should be equal to five times the amount of the difference between the sum of Rs. 1,386 and the average price of one chest of *Patna* opium, of the opium to be sold at such first public Government sale, to be calculated as aforesaid, if such average should exceed the sum of Rs. 1,386 per chest. That the average price per chest of the *Patna* opium sold at the first public sale of opium, which took place at *Calcutta*, next after the making of the said promise, viz., the 7th of *December*, 1846, was Rs. 1,793, one quarter of a Rupee, and 44 Reas per chest, and exceeded the sum of Rs. 1,386 per chest by Rs. 407, one quarter of a Rupee, and 44 Reas per chest; and that five times the amount of such excess amounted to Rs. 2,036, 3 quarters, 19 Reas, of which the Defendants had notice, and that the Defendants, although a reasonable time had elapsed, did not pay such difference or any part thereof. The Plaint contained thirty-two other counts upon similar contracts, varying, however, in dates and amounts. The thirty-fourth count stated, that on the 19th of *October*, 1846, in consideration that the Plaintiffs, at the request of the Defendants, would then pay the Defendants the sum of Rs. 450, the Defendants promised the Plaintiffs to pay the Plaintiffs within a reasonable time after notice of the first public Government sale of opium, to take place at *Calcutta*, next, after the said promise, such a sum as should be equal to five times the difference between the sum of Rs. 1,400 and the average price of one chest of *Patna* opium, of the *Patna* opium to be sold at the first public Government sale of opium, to take place at

1850.

DOOLUBDASS PETTAMBERDASS and others v. RAMLOLL THACKOORSEYDASS and others.

Calcutta, next, after the said promise, whether the said average should exceed or be less than the said sum of Rs. 1,400 (such average to be calculated in the same manner as the average in the first count mentioned). The remaining eleven counts were upon similar contracts, whereby, in consideration of a present payment, the Respondents were to receive the differences of the average above the fixed sum.

The Defendants pleaded, first, *non assumpsit*, denying the several contracts as made; secondly, that the Plaintiffs caused the Defendants to enter into and make the several contracts and promises in the plaint mentioned, and that the Defendants were, in fact, induced to enter into, and make the same and each of them, through the fraud and covin of the Plaintiffs and divers other persons in collision with them. Thirdly, that the average price per chest of the *Patna* opium, so sold at the said public Government sale as in the said several counts was alleged, was an average price, enhanced by and through the fraud and covin of the Plaintiffs and others in concert and collision with them. Fourthly (an additional plea, filed by leave of the Court), that the East India Company, for a long time previously to, and until, and at the respective times of the making of the promises in the above counts mentioned, had been, and were accustomed to hold periodically, public and auction sales of *Patna* opium, at *Calcutta*, upon, under, and subject to, certain accustomed terms and conditions, and which terms and conditions were, during and at the several times aforesaid, publicly known; to wit, at *Bombay* aforesaid, and that during all the times aforesaid, it was a practice and usage, in *Bombay*, to speculate and traffic by way of wager, upon the chances and contingencies of the

prices of, and for which, the *Patna* opium to be offered for sale, and bid for at the said accustomed sales, should be sold and knocked down, and that, according to the course of dealing and usage of and amongst merchants and others engaged in the said speculation and traffic, in *Bombay*, the words "First public Government sale," "First sale," "First sale to be made by Government," "First auction," or any other words, phrase, or expressions whatever, signifying or referring to either of the public sales hereafter to be held, did, during and at the times aforesaid, when written, or used and employed, in any and every contract, engagement, or promise, in or connected with the said speculation and traffic, signify, refer to, and denote a sale or sales to be held under, upon, and subject to the accustomed terms and conditions, and not otherwise: and that the several contracts and promises of the Defendants, in the above counts mentioned and set out, were respectively made at *Bombay* aforesaid, and subject, according to the usage and course of dealing, and with reference thereto, and that the first public Government sale in the contracts and promises, and in the above several counts respectively mentioned, was, and signified, and, at the respective times of the making of the contracts and promises, and all along was, by the Plaintiffs and by the Defendants, intended to signify, such usual public auction sale of the East India Company, under and subject to the accustomed terms and conditions as should then next take place; and the Defendants averred that no public Government sale under or subject to the terms or conditions, or according to the usage and course of dealing, or according to the intent and meaning of the contracts and promises respectively, and of the

1850.

DOOLUBDASS PETIAMBERDASS and others v. RAMLOLL THACKOORSEYDASS and others.

parties thereto, as in this plea above described, had, since the making of the contracts and promises, or either of them, and before the commencement of the suit, taken place; but that on the day in that behalf in the several counts described, a certain public Government sale of opium at *Calcutta*, being the next public Government sale of opium after the making of the several contracts and promises, did in fact take place, the terms and conditions of which sale last aforesaid, were and are materially different from the accustomed terms and conditions.

The Plaintiffs joined issue on the first plea, and traversed each special plea by the general replication, *de injuriâ*.

The cause was tried before the Chief Justice, Sir *Erskine Perry*, and Sir *William Yardley*, Puisne Judge, in *March*, 1849. From the evidence, taken under a commission at *Calcutta*, and given *vivâ voce* at the trial, it appeared, as laid in the plaint, that on the 20th of *October*, 1848, the Appellants and Respondents mutually entered into verbal contracts, by way of wager, to the effect, that the Respondents would pay to the Appellants such a sum of money as should be equal to five times the amount of the difference between the average price of one chest of *Patna* opium, of the opium to be sold at the first public Government sale of opium at *Calcutta*, to be calculated according to the actual price which the whole amount of *Patna* opium which should be sold at such sale should realize, and the sum of Rs. 1,386, if such average should be less than Rs. 1,386, and that the Appellants would pay the Respondents a similar sum if such average should exceed the sum of Rs. 1,386. That on the 20th of *August*, 1846, the Government

issued a notification or advertisement, that the next Government sale would take place on the 30th of *November*, 1846, and that 2,405 chests of opium would be put up for sale at *Calcutta:* under these conditions (among others) of sale; that the opium would be offered at the upset price of 400 Rs. per chest; that if 2,405 chests should not be sold, it should be competent to the Board of Customs, Salt and Opium, to dispose of the lots which remained on hand at future sales; that eight other sales would take place in the seven ensuing months; that under the sixth article of the convention between *Great Britain* and *France*, of the 7th of *March*, 1815 (*a*), the agents in *India* of His Majesty the King of the French, or persons duly appointed by them, were entitled to demand that out of the quantities of the *Behar* and *Benares* opium declared as above for sale at the nine sales, there should

(*a*) The 6th Article of the Convention between *Great Britain* and *France*, dated the 17th of *March*, 1815, above referred to, is as follows:—

"Article 6th.—With regard to the trade in opium, it is agreed between the high contracting parties, that at each of the periodical sales of that article, there shall be reserved for the French Government, and delivery upon requisition duly made by the agents of His Most Christian Majesty, or by the persons duly appointed by them, the number of chests so applied for, provided that such supply shall not exceed three hundred chests in each year, and the price for the same shall be determined by the average rate at which opium shall have been sold at every such periodical sale, it being understood that if the quantity of opium applied for at any one time shall not be taken on account of the French Government by the agents of His Most Christian Majesty, within the usual period of delivery, the quantity so applied for shall nevertheless be considered as so much in reduction of the three hundred chests hereinbefore mentioned. The requisitions for opium as aforesaid, are to be addressed to the Governor-General at *Calcutta*, within thirty days after notice of the intended sales shall be published in the Government Gazette."

1850.

DOOLURDASS PETTAMBERDASS and others v. RAMLOLL THACKOORSEYDASS and others.

be delivered to them, at the average of the particular sale or sales to which opium so applied for might belong, a quantity not exceeding in the aggregate 300 chests. It further appeared, that the Government of *India* possessed the monopoly of cultivating and the sale of opium in *India*. That the sales were conducted in the same manner as sales in general by public auction, with unrestricted public competition, and that such sales afforded the public in *India* opportunities of purchasing opium, the Government of *India* having bound themselves, by the published conditions, to sell to the highest bidder above the upset price of Rs. 400 per chest. That it was very usual in *India* for parties to make wagering contracts upon the average price of opium at these public sales. That the native merchants' houses entered extensively into such transactions, and had done so for the last thirty years; that parties who speculated for the rise usually attended at the sales, and bought the opium themselves; that it was always known beforehand who were the great speculators; and that it was well known in *India* that the Respondents intended and had threatened to buy up all the opium. It was also in evidence, that the Respondents and their brokers, having entered into a number of similar contracts with other parties to a very large amount, to effect a rise in the price of opium, procured certain persons to bid at the first sale, which took place on the 30th of *November*, and that the biddings were forced up till the price bid for the first lot was Rs. 130,000, a price so extravagant, that the Government Officer stopped the sale, without having knocked down a single lot. That the opium was again put up for sale on the 4th of *December*, 1848, with an additional condition, that it

should be lawful for the Government Officer to withdraw any lot, and put it up again at an upset price, diminishing the same until a *bonâ fide* bid was obtained. That about this time the Respondents' agents purchased from the French Consul at *Calcutta*, representing the French Government, the right to demand 300 chests of opium, paying him Rs. 30,000 for it, in order to reduce the number of chests to be offered for sale. That the sale took place on the 7th of *December*, 1846, when the Respondents and their agents, and many other persons, attended, and 1,315 chests of opium were purchased by the Respondents, through their agents, at an average price of Rs. 1,793 per chest.

The Court took time to consider their verdict and judgment; and on the 4th of *April*, 1849, pronounced their judgment. The Chief Justice was of opinion, that the verdict should be entered for the Plaintiffs upon each of the issues; that the Plaintiffs were not bound by any rule of law to disclose to the Defendants that they intended to make larger purchases then than they did on former occasions; that it was their interest to raise the price as high as they could, on this as on all former occasions, and it was the Defendants' own fault for not perceiving that circumstances in the present case enabled the Plaintiffs to do so with effect, and that, therefore, judgment should be entered for the Plaintiffs for the difference on the several contracts declared upon in the plaint.

Sir *William Yardley* differed from the Chief Justice, and expressed his opinion, that the Plaintiffs, having, at the time of the making of these bargains, cherished the design of forcing up the prices by the expenditure of a very large sum of money, in the purchase of the

1850.

DOOLUBDASS PETTAMBERDASS and others v. RAMLOLL THACKOORSEYDASS and others.

opium, at a price very much higher than it would have otherwise fetched, in order that they might win a much larger sum of money on the wagers they had made, and having in pursuance of such design, by themselves and agents, attended the sale, and by advancing on their own biddings, actually forced up the price to a fictitious and delusive height, and thus greatly enhanced the average price; the second and third pleas on this record had been proved, and that, consequently, there ought to be a verdict for the Defendants, upon the issues raised by those pleas. As the Chief Justice had the casting vote, the verdict was entered generally for the Plaintiffs, for the whole amount claimed, with interest and costs.

From this verdict and judgment the present appeal was brought, and the Appellants contended that the same was erroneous, and ought to be reversed, for the following reasons:—

1st. Because the verdict and judgment ought to have been given in favour of the Appellants.

2nd. Because the contracts alleged were not proved, and because evidence was improperly received and admitted in support of the same, and that the Respondents ought to have been nonsuited at the trial.

3rd. Because, although the Court would not, upon appeal, as in a somewhat similar case, upon demurrer (*Ramloll Thackoorseydass* v. *Soojumnull Dhondmull*, 6 Moore's P. C. Cases, 300), presume that the Respondents intended to act, or would act, illegally or improperly, yet the Respondents in this case are now proved to have done so, and, upon facts given in evidence, were not entitled to recover.

4th. Because the whole of the transactions were, upon the facts proved at the trial, illegal and void,

and were contrary to public policy, as prejudicially affecting the interests of the public and the State, and the public market and price of an article of State monopoly.

5th. Because the transactions were illegal and void by Hindoo law; were contrary to the policy of that law; and the Respondents having been guilty of artifice and collusive practice, deceit and fraud, were not, according to Hindoo law, entitled to recover.

6th. Because the Respondents had secured the power and control over the result of the wagers in their own hands, and intended to use, and in fact did use, such power in their own favour, and in fraud of the Appellants.

7th. Because the Respondents were guilty of a conspiracy, and also of fraudulent and illegal concealment, practices and contrivances to defraud the Appellants, in inducing them to enter into the alleged contracts.

8th. Because the alleged contracts refer only to one particular time and occasion, viz. the Government auction, advertised for the 30th of *November*, 1846; that they related only to an average to be ascertained at that date, and on that occasion; and it was from that date only that the time for payment was to be calculated; and that as no opium was sold, nor any average ascertained on that occasion, the contracts became inoperative, and the Respondents were not entitled to recover the damages awarded to them.

9th. Because the auction on the 7th of *December* was not the sale to which the alleged contracts were intended to apply; that it was not a continuation or adjournment of the auction of the 30th of *November*; that it was an entirely new sale, at a different time

1850.

DOOLUBDASS PETTAMBER-DASS and others v. RAMLOLL THACKOOR-SEYDASS and others.

and on different terms; and its nature and character entirely changed from that contemplated by the Appellants, and to which the alleged contracts were intended to apply.

10th. Because the Respondents were guilty of conspiracy and fraud, and illegal and improper conduct at and prior to the last-mentioned sale, whereby the price of opium was improperly enhanced in fraud of the Appellants, as well as to the injury and prejudice of the public.

11th. Because the Respondents, in fraud of the Government and public, as well as in fraud of the Appellants, did unlawfully conspire, and, by artifice and collusion, contrive to keep out of the Government sale, and prevent the Government from then selling, a large quantity of the opium advertised and intended to be there sold, and to the sale of which the alleged contracts of the Appellants had reference.

12th. Because the conduct of the Respondents, in respect to the sale of the 7th of *December*, prevented any legal average from being struck or ascertained.

13th. Because the Respondents caused delusive biddings to be made at such sale, in order to compel the public to bid larger sums, and to purchase at higher prices than they would otherwise have done, and succeeded by such delusive biddings in compelling a *bonâ fide* purchaser to give such increased amount, whereby the average price was enhanced for the Respondents' own benefit.

14th. Because the Respondents prevented a fair and *bonâ fide* sale taking place, and were guilty of a conspiracy in fraudulently enhancing the price to the public, and preventing their purchasing at fair prices at such sale.

15th. Because, under Act, No. 21 of 1848, passed by the Governor-General of *India* in Council, and intituled, "An Act for avoiding wagers," the Court below ought not to have allowed and entertained the suit, or to have heard or tried the same after that Act was passed.

16th. Because, even if the verdict and judgment were rightly entered for the Plaintiffs, interest ought not to have been awarded to them.

17th Because no costs ought to have been awarded to them.

The Respondents relied upon the following reasons in support of the judgment appealed from:—

1st. Because there was legal evidence of the contracts set out in the plaint, and the verdict was unanimously given upon the first issue.

2nd. Because the said first sale referred to by the several contracts mentioned in the plaint took place, and there was such an average price as that referred to by the contracts at the first sale.

3rd. Because there was no evidence to support the fourth plea, and there is no sufficient ground for disturbing the verdict upon the issue raised upon that plea.

4th. Because the verdict of the Chief Justice upon the issues raised upon the second and third pleas is correct, and there are no sufficient grounds for disturbing it.

Mr. *Bethell*, Q. C., Mr. *Leith*, and Mr. *Bovill*, for the Appellants; and

Sir *Fitzroy Kelly*, Q. C., Mr. *Peacock*, Q. C., and Mr. *Leach*, for the Respondents.

The argument turned upon the questions raised in the above reasons of appeal.

1850.

DOOLUBDASS PETTAMBERDASS and others v. RAMLOLL THACKOORSEYDASS and others.

As to the conduct of the Plaintiffs in bidding and employing agents to bid at the sale, to enhance the price of the opium, amounting to a fraud and conspiracy at Common Law, so as to prevent the Plaintiffs recovering upon such contracts, *Levi* v. *Levi* (*a*), *Bexwell* v. *Christie* (*b*), *Fuller* v. *Abrahams* (*c*), *The King* v. *Waddington* (*d*), *The King* v. *De Berenger* (*e*), *Rex* v. *Marsh* (*f*), *Thornett* v. *Haines* (*g*), *Fisher* v. *Waltham* (*h*), *Ramloll Thackoorseydass* v. *Soojumnull Dhondmull* (*i*), *Sahajram* v. *Chytun Doss* (*j*), 4 Steph. Com., p. 264 (Edit. 1841), 2 Russell "On Crimes," p. 677, were referred to.

And that, being a gambling transaction, it was illegal and void by the Hindoo law, *Moteelal Heeralal* v. *Jumnadas* (*k*), *Jetha Bhaee Mooljee* v. *Hutesingh Lala Hurukchund* (*l*), were relied upon.

Upon the construction of the Act of the Indian Legislature, No. 21 of 1848, having a retrospective operation, and being a bar to the suit, *Freeman* v. *Moyes* (*m*), and *Moon* v. *Durden* (*n*), were cited.

Mr. Baron PARKE:

9th Dec., 1850.

This case was fully argued before their Lordships at the sittings after last Trinity term.

It is an appeal from the judgment of the Supreme Court of *Bombay*, in an action commenced in *January*, 1847, on forty-five wager contracts, entered into in *October* and *November*, 1846, that the average price

(*a*) 6 Car. & Pay. 239.
(*b*) Cowper, 395.
(*c*) 3 Brod. & Bing. 116.
(*d*) 1 East. 143.
(*e*) 3 Mau. & Sel. 67.
(*f*) 3 You. & Jer. 331.
(*g*) 15 Mee. & Wel. 367.
(*h*) 4 Q. B. Rep. 889.
(*i*) 6 Moore's P. C. Cases, 300.
(*j*) Not reported.
(*k*) 2 Borr. Bom. Rep. 621.
(*l*) 2 Borr. Bom. Rep. 415.
(*m*) 1 Ad. & Ell. 338.
(*n*) 2 Exch. Rep. 22.

which a chest of *Patna* opium should be sold for and realize, at the first Government sale, should exceed a certain fixed price. The Plaintiffs in the different counts aver what the average price at that sale was, and seek to recover the differences between that price and the fixed sum per chest, amounting to a very large sum of money.

The Defendants pleaded:—First. The general issue. Secondly. That the Plaintiffs caused them to enter into and make the several contracts, and that the Defendants were, in fact, induced to enter into and make the same, through the fraud and covin of the Plaintiffs, and of other persons in collusion with them. Thirdly. That the average price per chest of the *Patna* opium so sold, at the said public Government sale, was an average price obtained by and through the fraud and covin of the Plaintiffs and others, in concert and collusion with them. And lastly, a plea was added, which was in substance, that the term, "first Government sale," &c., denoted such a public auction sale, as should be held, subject to certain accustomed terms and conditions, and not otherwise, as should then next take place, and that no such public sale did take place, but that a sale took place subject to terms materially different.

The Plaintiffs traversed such special plea by the general replication *de injuriâ*, and the cause came on to be tried, in *March*, 1849, before the Chief Justice, Sir *Erskine Perry* and Mr. Justice *Yardley*, who, after time taken to consider, differed in opinion, and pronounced their verdict on the 2nd of *April*, 1849. Both agreed in finding a verdict for the Plaintiffs on the first and last issues; but on the second and third, the Chief Justice was in favour of the Plaintiffs; Mr.

1850.

DOOLUBDASS PETTAMBERDASS and others v. RAMLOLL THACKOORSEYDASS and others.

Justice *Yardley*, of the Defendants; but, as provided for in such a case, the judgment was given according to the opinion of the Chief Justice, and the sum recovered was given with interest and costs, and against that judgment there is an appeal.

In the argument before us, the objections which, we collect from the papers, were taken in the Court below, were renewed, and additional objections urged to the Plaintiffs' right to recover.

I will shortly recapitulate those objections, and it will then be found, that the main question to be decided is a mere question of fact. One of those objections which were taken at the trial was, that the contracts were not proved to have been made by the Defendants' authority, and that, if proved, they were not properly described, being contracts, as they were in form, for the purchase and delivery of opium, not wagers or contracts for the payment of differences as alleged.

Their Lordships were of opinion, and expressed that opinion in the course of the argument, that there was ample evidence of the authority of the Defendants' brokers to make the contracts, and also that the real nature of those nominal purchases was, that they were contracts to pay differences; so that the unanimous decision of the Court on these points must be deemed quite satisfactory.

Another objection also was taken on the trial, arising on the fourth plea. It appeared that the course was, that all sales of opium, of which the East India Company had the monopoly, took place at stated periods, which were advertised; and at the time of the contracts the first sale of opium was advertised for the 30th of *November*, 1846, subject to

certain conditions. This sale turned out to be abortive, as the whole day was spent in bidding up the opium to an extravagant price, and the Company's agents would not allow the sale to take place. The sale intended for the 30th of *November* was postponed till the 7th of *December*, and fresh conditions were prescribed for that sale, which took place then; all the opium was sold, and the average price of a chest exceeded that which the Plaintiffs and the Defendants had fixed upon in their wagers.

It was contended for the Defendants, that the first sale mentioned in their contracts was meant to be a first sale, subject to the then usual conditions, and as there had been no such sale, the event contemplated had never occurred, and, therefore, the wager had not been lost.

If the additional qualification, that the first Government sale should be a sale subject to the same conditions as were then imposed, could be imported into the contract by parol (which we need not decide), the evidence, as the Court has already intimated, did not prove any usage of trade to that effect. Indeed, there is evidence to the contrary. That objection, therefore, fails.

But it was also contended, that the exposure to sale on the 30th of *November* was the first sale meant by the contract, and that on that sale there was no difference between the price fixed and that actually realized, because no price was obtained, and, therefore, the wager had not been lost; and though this had not been made the subject of a plea, yet, that it was an available objection in reduction of damages, and that only nominal damages should be recovered, as there was in effect no difference to be paid.

1850.

DOOLUBDASS PETTAMBERDASS and others v. RAMLOLL THACKOORSEYDASS and others.

We, however, think, that according to the true construction of the contract, the price of the first actual sale was the object of the wager, and the intended sale on the 30th of *November* was not a sale, but the sale on the 7th of *December* was the first sale. This objection, therefore, also fails.

Two other objections, one of which could not be, and the other was not urged in the Court below, were also taken, in both of which their Lordships intimated their opinion in favour of the Respondents, and they see no reason now to alter it.

The first was, that since the contracts were entered into, and since the commencement of the trial in the Court at *Bombay*, these contracts were rendered invalid by the Act of the Governor-General in Council, on the 10th of *October*, 1848, intituled, "An Act for avoiding wagers," and, therefore, the Plaintiffs could not have judgment, and that this judgment ought to be reversed.

The Act provides, "That all agreements, whether made in speaking, writing, or otherwise, by way of gaming or wagering, shall be null and void; and no suit shall be allowed in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won on any wager, or entrusted to any person to abide the event of any game, or on which any wager is made."

Their Lordships are of opinion, that this Legislative Act is not to be construed as affecting existing contracts; at all events, not those contracts on which actions have already been commenced, for Statutes are *primâ facie* deemed to be prospective only "*nova constitutio futuris formam imponere debet, non præteritis*" (2 Inst. 392), and there are no words in this

Act sufficient to show the intention of the Legislature to affect existing rights. Their Lordships agree in the judgment of the majority of the Court of Exchequer, on the construction of the corresponding Act of Parliament of the United Kingdom, in *Moon* v. *Durden* (2 Exch. Rep. 22).

In the next place it was contended, that by the Hindoo law such contracts were void, and that this objection was open to the Appellants, the declaration being on the face of it bad.

Their Lordships have already said that they are not satisfied from the authorities referred to, that such is the law among the Hindoos, and supposing that *primâ facie* the contracts are to be taken to be between persons of that nation, a point on which we need say nothing, we think we cannot say that the contracts were illegal, especially as the point was not made in the Court below, which had better means of deciding that question than we have.

It remains, therefore, for us to consider the other and the main objections to the right of the Plaintiffs to recover, arising on the second and third pleas which have been most relied upon in the argument before us.

For the Appellants (the Defendants below), it was contended, that it was a fraud on the Defendants, in such wagers as these, to bring about the event by which each wager could be won by acts of their own, that such fraud was meditated and prepared by the Plaintiffs before the contracts were entered into, and, therefore, the Defendants meditating no such acts on the part of the Plaintiffs, the contract was void on the ground of fraud on them; and the second plea should have been found for the Defendants, or, if not, that, at all events, the meditated fraud having been carried

1850.

DOOLUBDASS PETTAMBERDASS and others v. RAMLOLL THACKOORSEYDASS and others.

into effect, and the prices raised by the acts of the Plaintiffs and their agents, those prices were fraudulently raised as against the Defendants, and, therefore, the third plea ought to have been found for the Defendants.

This point appears to their Lordships to be purely a question of fact, depending on the evidence.

It may be conceded that there was evidence, not that any steps were taken to enhance the price, by employing persons to bid at the intended sale, prior to the date of the contracts, but to raise a reasonable inference that the Plaintiffs at that time meant by their own acts to raise the market, and then the question would be, whether this intention would enable the Defendants to avoid the contracts under the second plea. Further, there was ample evidence, no doubt, that the Plaintiffs did try to raise the price at the sale, by their own acts, and did succeed in so doing; and the question is, whether these acts are a fraud on the Defendants, within the meaning of the third plea. This, the main point in the case, and which applies to both pleas, depends entirely on the question of fact, what was the understanding of the parties to the contract when it was made?

Both the learned Judges of the Court below appear to have agreed upon this being the question.

The Chief Justice, in his very learned judgment, most correctly states, that if the event, on which both parties were speculating, was the market price, as it should be governed by the ordinary cases of supply and demand, or as it should be governed by the contests of speculators, wholly unconnected with the Plaintiffs, then, undoubtedly, the Plaintiffs would have taken a fraudulent advantage, and the event brought

about by their own agency is not the event which was contemplated in the contract of hazard entered into by the parties; and Mr. Justice *Yardley* agrees in that position, and illustrates it by a simple supposed case, in which it would be manifestly a fraud in one of the contracting parties against the other, himself, by his own act, to win the wager; as where a man bets that a horse would fetch a certain price at an auction, he could not win the wager by bidding that very sum; and there can be no doubt upon that proposition.

But the true question is stated most correctly by the Chief Justice, to turn on one point, was it understood by the parties at the time the bets were made, that it was competent for the Plaintiffs to enter into the market as speculators, and endeavour to raise the price by their own biddings? And this is the question of fact on which the two learned Judges differed. Mr. Justice *Yardley* thinking, that the evidence did not prove any such understanding; indeed, going so far as to intimate an opinion, that nothing short of the expression of that understanding in the contract itself would be sufficient. The Chief Justice being of opinion, that the understanding was most clearly proved, that the Defendants knew well when they made the wagers, that the Plaintiffs would use all their efforts and all the power which their command of capital gave them, to run up the prices at the sale, and that the Defendants contracted with them on those terms, and that the wagers were in fact nothing more than one speculator backing his own opinion against that of another, on an event to be operated upon by the wealth, faculties and judgment of both parties; that according to their mutual understanding, each, therefore, had a right to use the means in

1850.

DOOLUBDASS PETTAMBER-DASS and others v. RAMLOLL THACKOOR-SEYDASS and others.

his power, one to elevate the market price by bidding and inducing others to bid; the other to depress it, by persuading persons not to bid, always supposing that such means were otherwise legal.

Upon a full consideration of the evidence, their Lordships are of opinion, that the view taken of it by the Chief Justice is the correct one, and we think his decision as to the matter of fact fully warranted and called for by the evidence in the case.

The Plaintiffs had entered into a great speculation, the success of which was very doubtful, and depended on the amount of capital they could produce, when the opium was to be paid for, and the number of wagering contracts they could make upon the price of it in the meantime, and also upon the greater activity of themselves and their agents in bidding to raise the price, than that of the Defendants or their agents in endeavouring to lower it. This, we think, is clearly proved.

It is true that some witnesses use the expression, that it was the practice for the speculators for a rise, to attend themselves and bid at a sale; and an argument is used that the evidence shows only an understanding that the contracting party should himself bid; but the witnesses do not state negatively that another, or others, might not attend on his behalf; and one of the witnesses, *Dadebhoy Rustomjee*, gives evidence that speculators for such a rise influence the market, and that a large purchaser always bought through several hands.

So far as relates to the understanding between the parties as to what it is competent for either to do, we think, that the evidence does not show that the parties were to be confined to their own personal efforts,

by bidding themselves, or inducing others not to bid, but that they are at liberty to employ agents, and not one agent only, for these purposes, without breaking the contract between them. Whether the employing of more agents than one will render the act of bidding illegal, as to third persons, is another point, which will afterwards be considered. Between the parties, we think it was clearly no violation of their mutual understanding so to do.

Their Lordships think, therefore, that the efforts made to raise the market by the Plaintiffs, by bidding by themselves and agents, were no fraud on the Defendants, as such course was, according to the understanding of both parties, to be pursued, and consequently, that the intention to use those efforts was not a fraud which rendered the contract voidable by the Defendants.

But it was further argued, that even admitting that there was no fraud on the Defendants by pursuing that course, the acts done by the Plaintiffs and their agents were a fraud on third persons, and, therefore, illegal, and that the contract might be avoided by reason of that intended fraud; or, at all events, that the Plaintiffs could not recover damages which they were only entitled to do by reason of that fraud on third persons. It would seem from the report of the judgment in the Court below, that this view of the case was not pressed on the learned Judges. Both consider only whether this conduct would be a fraud on the contracting parties, and the Chief Justice states that the acts were admitted to be "not otherwise illegal."

But, on the hearing of this appeal, this further objection is brought forward, and we are bound to dis-

1850.

DOOLUBDASS PETTAMBERDASS and others v. RAMLOLL THACKOORSEYDASS and others.

pose of it. The objection is, that the means used by bidding merely to enhance the price, was a fraud on those who were intending to purchase *bonâ fide*, and especially when others conspired with the Plaintiffs to bid for the same purpose; and, further, that the act of giving to the French Consul the sum of Rs. 30,000, to induce him to exercise the option given by Treaty to the King of the French, to buy 300 chests, was also a fraud on the East India Company, and the average price having been raised by these acts conjointly, the Plaintiffs could not recover if either was illegal.

It was argued on behalf of the Respondents, that this species of fraud and consequent illegality did not fall within the meaning of the third plea; and so their Lordships are disposed to think; but, being unwilling to dispose of so great a case upon a point of pleading, they proceed to consider whether the Defendants are entitled to succeed on the merits.

With respect to the bidding by one of the Plaintiffs himself, said to be done merely to enhance the price, their Lordships think it was no fraud on any one. There is no law which prevents any person buying any quantity of a commodity at any price that he likes, whether to use himself, or to sell again in gross or by retail, or to give away, or to prevent another having it, provided always, that he does not commit the Common Law offence of forestalling and regrating, which this is not, or ingrossing, which the authorities show can be committed only with respect to the necessaries of life; provided, also, that he makes no false representation in order to effect the purchase.

In all these cases, the buying of any commodity when the purchaser does not want it, necessarily raises

the price, and so causes a damage to all others who do, and who buy for the purpose of using it; but the purchase is not on that account a fraud on them. The market is open to all who buy, whatever their object may be: whether the Plaintiffs meant to buy to sell again at a profit, or to make their profits by the collateral contracts that they had entered into with others, appears to their Lordships to make no difference.

But it is said, that the fact of employing several agents who were all cognizant of the purpose as well as the Plaintiffs, constituted an illegal conspiracy, an indictable offence; and the Plaintiffs cannot, therefore, recover a difference of price created by that illegal conspiracy. But so far as the doctrine of conspiracy has been extended, we do not find that there is any satisfactory authority that this would be an indictable offence where there was no *crimen falsi* committed, when the commodity is not a necessary of life, to which only, as has been said, the offence of ingrossing or regrating applies; a charge of a description which not only ought not to be extended, and which itself would not meet with much countenance in these times, when the true principles of trade and commerce are better and more generally understood.

The *dictum* of Baron *Gurney* in the case of *Levi* v. *Levi* (6 Carr. & Pay. 239) was much relied upon, to show that an agreement of several not to bid at an auction was an indictable offence; but this was a mere *dictum* in a *Nisi Prius* case, and cannot, we think, be relied upon.

It is argued, however, that this proceeding by bidding by the Plaintiffs themselves, or in conjunction with others, is analogous to "puffing," and is illegal

1850.

DOOLUBDASS PETTAMBERDASS and others v. RAMLOLL THACKOORSEYDASS and others.

on the same principle. But the distinction is in our judgment plain. A puffer is not a real bidder. By arrangement between him and the vendor his bid is to go for nothing; but as to the competing bidders, it appears to be what it is not, a real bidding, and the vendor, by authorizing it, is guilty of a fraud on them, and cannot profit by it.

Here the Plaintiffs and their agents are all real bidders. He whose bid is the highest is bound to pay the price, and no false colours have been held out to other intended buyers.

Another point insisted upon before us was, that the purchase of the option reserved to the French Government was illegal.

By the sixth Article of the Convention between *Great Britain* and *France*, there is reserved to the French Government, or those employed by them, the right to request a reserve of not exceeding 300 chests a year, and if the quantity required is not taken and paid for in the agreed period, the quantity required is to go in reduction of the 300 chests.

The Plaintiffs purchased from the French Consul this option, for Rs. 30,000, meaning not to exercise the right of purchase, but to cause the quantity to be retained, and so diminish the quantity of opium to be sold at the sale. The requisition was accordingly made, and the quantity offered for sale at that sale, diminished by 300 chests.

It was argued that this was a fraud against the East India Company, the vendors, who were thereby prevented from selling the 300 chests at that sale, which they would have done if the French Government had been left to itself. But their Lordships do not think that this is a fraud on the Company. By the Treaty,

the French Government has an unlimited power of exercising the option, and may do so for any reason they may think fit, and the East India Company have no right which is infringed upon by the exercise of the option for a collateral pecuniary advantage. It was indeed insinuated that this sum was given as a bribe to the French Consul, and was, therefore, a fraud on his Government; but it is not proved that the money was given as a bribe, but it must be intended that it was given for the use of the French Government.

Their Lordships, therefore, think that none of these objections are sustained, and that the Plaintiffs' conduct does not appear to have been illegal. However much they disapprove of these wagering transactions (which happily are now put an end to), however disreputable and unbecoming in men of a nice sense of honour, or of high mercantile character, were the means adopted by the Plaintiffs to win their wager may be, still we cannot pronounce them to be fraudulent in contemplation of law, which only seeks to lay down broad rules for the government of human conduct applicable to all classes of persons, and does not exonerate parties from their contracts (which it is its primary duty to enforce) on the ground of fraud, except where they are distinctly shown to be in violation of the ordinary rules of morality. Our attention was called to the decision of the learned Judges of the Supreme Court of *Calcutta* in a similar case (*a*). The Judges of that Court on the trial considered the conduct of the Plaintiffs as not fraudulent, and gave their verdict for the Plaintiffs at *Nisi Prius*. That opinion they subsequently changed. What the particular facts

(*a*) Sahajram *v.* Chytun Doss, decided by the Supreme Court at Calcutta, on the 28th of January, 1850.

1850.

DOOLUBDASS PETTAMBERDASS and others v. RAMLOLL THACKOORSEYDASS and others.

in evidence were, to show that it was the understanding of the contracting parties as to using all means to raise or depress the price, does not appear, and, therefore, we are not in a condition to say what the verdict ought to have been; but the opinion delivered by these learned Judges on the supposition that there was such an understanding, that the bidding was a fraud on third parties, we cannot think to be well founded.

We are of opinion, therefore, that the Plaintiffs were entitled to recover in this action.

Two subordinate points remain for consideration.

First, as to interest, we think the Court below were warranted in giving it, for it appears that interest was accustomed to be paid on such pecuniary transactions.

Lastly, as to costs, we concur in the opinion of the Chief Justice, that the general rule should be that they follow the event of the verdict, and in this case, as the verdict for the Plaintiffs was, in the judgment of their Lordships, right, they ought to have their costs.

We shall, therefore, recommend to Her Majesty that the judgment should be affirmed, and the appeal dismissed, with costs.

ON APPEAL FROM THE EAST INDIES.

BENGAL SECRETARIAT 137 LIBRARY

THOMAS CHARLES LOUGHNAN and others, - - - - - - } *Appellants,*

AND

HAJI JOOSUB BHULLADINA and another - - - - - - } *Respondents.**

On appeal from the Supreme Court at Bombay.

THE "HYDROOS."

18th Feb., 1851.

THIS was a question respecting the Appellants' right to appeal from a sentence of the Supreme Court at

* Present: Lord Langdale, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

The *Bombay* Charter (*December*, 1823,) establishes the Admiralty Jurisdiction of the Supreme Court, "as the same is used and exercised in that part of *Great Britain* called *England*, together with all and singular their incidents, emergents and dependencies annexed and connexed causes whatsoever; and to proceed summarily therein, with all possible despatch, according to the course of our Admiralty in that part of *Great Britain* called *England*." Held, upon a construction of such Charter, that the rules and practice of the High Court of Admiralty in *England*, prevail and govern the proceedings in the Supreme Court at *Bombay*, in maritime causes.

In a salvage cause, the Supreme Court, by its sentence pronounced in *March*, 1849, dismissed the claim of the salvors. In the month of *April* following, the Promoventa moved for a rule *nisi* to show cause why the Defendants should not pay their costs. This rule the Court refused. In *August*, in the same year, the Promoventa applied for and the Supreme Court granted leave to appeal to *England* from the principal sentence of *March*, 1849. No objection was taken to the competency of the appeal in *Bombay* by the Respondents, nor was any protest against the right of appeal entered in *England*, but the Respondents at the hearing objected to the reception of the same, contending, that the appeal was perempted by the proceedings had in the month of *April*.

Held, that such objection was fatal, that the application for costs after the decision in the cause, had the effect of absolutely perempting the appeal, so as to entirely take away from the Supreme Court the power of granting leave to appeal, as nothing could, after the proceedings in *April*, be done to restore the appeal from the principal sentence.

Costs of appeal, under the circumstances, refused.

1851.

LOUGHNAN v. HAJI JOOSUB BHULLADINA.

The Hydroos.

Bombay, in its Admiralty jurisdiction, in a cause of salvage: whether the appeal was not perempted by the act of the Appellants.

This objection was taken at the hearing of the appeal, and arose under the following circumstances:—

The cause was promoted in the Supreme Court at *Bombay*, by the Appellants, for salvage services rendered by them to the ship "*Hydroos*" and her cargo, the property of the Respondents. The cause came on for hearing on the 14th of *March*, 1849, when the Court dismissed the Act on petition for salvage. On the 5th of *April* following, a motion was made by Counsel for the Promovents for a rule *nisi*, calling upon the Defendants to show cause why they should not pay the Promovents their costs in the cause. This motion was heard and refused by the Court. On the 6th of *August* following, the Appellants presented a petition for leave to appeal to Her Majesty in Council from the principal sentence, dated the 14th of *March*, 1849, which the Court granted. The Respondents put in an absolute appearance, and no objection was taken at *Bombay* to the competency of the appeal.

The Respondents, in their printed case, raised for the first time an objection to the competency of the appeal, contending, that the right of the Appellants to appeal from the decision of the Supreme Court, dismissing their claim for salvage, had been absolutely and altogether perempted, when they filed their petition for leave to appeal, which was the first step on their parts, indicative of their intention to appeal; and the Respondents prayed, that the order of the Supreme Court, allowing the appeal, be reversed, and the appeal dismissed with costs, by reason, that such leave to appeal could not legally be given, and,

therefore, ought not to have been given by the Supreme Court at *Bombay*, at the time and under the circumstances, at and under which it was given; and that such appeal was a nullity in law.

The appeal being opened upon the merits,

Dr. *Addams* and Mr. *Aspland*, for the Respondents, were heard in support of this objection.

Upon the question of peremption of the appeal, they cited *The ship Clifton* (*a*), *The Queen* v. *Joze Alves Dias* (*b*), *Lloyd* v. *Poole* (*c*), *Greg* v. *Greg* (*d*), *Voet.*, vol. ii. lib. xlix. tit. "*De appellationibus et relationibus*," sec. 1., and insisted, that the objection to the appeal was in time, even if made at the hearing, *Rochfort* v. *Battersby* (*e*).

The Queen's Advocate (Sir *John Dodson*), Mr. *Lloyd*, Q. C., and Mr. *Forsyth*, for the Appellants,

Relied upon the acquiescence of the Appellants in the appeal granted by the Supreme Court, under the powers vested in that Court by the *Bombay* Charter (*f*); they also referred to the Statute, 3rd & 4th *Will.* IV., c. 41, s. 20, and urged the inconvenience of the course pursued by the Respondents in objecting to the appeal at the hearing, and not under protest.

The Right Hon. Dr. LUSHINGTON:

The present question arises upon an objection taken on behalf of the owners of the property, against which

(*a*) 3 Knapp's P. C. Cases, 375. (*b*) 6 Moore's P. C. Cases, 102.
(*c*) 3 Hagg. Ecc. Rep. 477. (*d*) 2 Add. 276.
(*e*) 2 H. L. Cases, 388.
(*f*) 23rd Dec., 1823. See post, p. 141, for extracts of this Charter.

1851.

LOUGHNAN v. HAJI JOOSUB BHULLADINA. The Hydroos.

the salvors claim, on the ground, that the asserted salvors ought not to be permitted, under the circumstances of the case, to proceed with their appeal against the sentence of the Admiralty Court at *Bombay*, by which sentence it was pronounced, that they were not entitled to salvage.

The facts of the case are shortly these: the principal sentence was pronounced on the 14th of *March*, 1849, and on the 5th of *April*, as appears from the papers, the following proceeding took place:—"Mr. Advocate-General being of Counsel for Promovents, moved for a rule to show cause why the Respondents should not pay to the Promovents their costs of the proceedings in the above matter; whereupon, and on hearing Mr. *Howard*, also of Counsel for the Promovents, who followed on the same side, it was ordered, that the said motion be refused, and that each party do pay their own costs of the hearing in the above matter, and of all other proceedings therein."

Now, there cannot be any doubt, that if proceedings, such as are here mentioned, had taken place in the High Court of Admiralty, in *England*, or in any Vice-Admiralty Court, or Admiralty Court governed by the same rules and regulations, any right of appeal, which existed in the claimants on the 14th of *March*, 1849, would have been entirely perempted and put an end to by those proceedings on the 5th of *April*. This is a rule which has always been adhered to with great strictness, and one of the cases which have been cited, the case of "*The ship Clifton*," proves with what severity the Court has been in the habit of applying this rule. We apprehend that the effect of perempting the appeal is entirely to take away the right of the Appellants to appeal at all, and that nothing that is hereafter done can restore the Appellants to the con-

dition in which they were before the time when the act of peremption took place.

This being so, according to the general course of proceedings in the High Court of Admiralty, and in all other Courts following the same rules of practice, the question which their Lordships have now to determine is, whether the same rules and the same mode of practice prevail in the Admiralty Court at *Bombay*, or whether any and what alteration has been made in consequence of the Charter which has created that Court.

There are two parts of the Charter to which it will be necessary to advert; first, that part of the Charter which confers upon the Court at *Bombay* the power of deciding Admiralty causes; and, secondly, that part of the Charter which provides for appeals generally.

Now, that part of the Charter which establishes the Admiralty jurisdiction of the Court is in these words:—"We do hereby grant, ordain, establish, and appoint, that the Supreme Court of Judicature at *Bombay* shall be a Court of Admiralty," for certain territories and districts therein mentioned; and then it grants to that Court "full power and authority to take cognizance of, hear, examine, try and determine all causes, civil and maritime, and all pleas of contracts, debts, exchanges, policies of assurance," and so on, "which, in any manner whatsoever, relate to freight, or money due for ships hired and let out, transport money, maritime usury, bottomry or respondentia, or to extortions, trespasses, injuries, complaints, demands, and matters, civil and maritime, whatsoever, between merchants, owners, and proprietors of ships and vessels, employed or used within the jurisdiction aforesaid." And then it states, that they shall take

1851.

LOUGHNAN v. HAJI JOOSUB BHULLADINA. The Hydroos.

cognizance thereof, "as the same is used and exercised in that part of *Great Britain* called *England*, together with all and singular their incidents, emergents, and dependencies, annexed and connexed causes whatsoever, and to proceed summarily therein, with all possible despatch, according to the course of our Admiralty of that part of *Great Britain* called *England*."

It appears, therefore, that by the authority of this Charter, founded upon the Act of Parliament (*a*), the Court of *Bombay* became a Court of *Admiralty* for the purposes therein stated, and that the mode of proceeding is strictly enjoined to be, according to the course in use in the High Court of Admiralty in *England*. Unless, therefore, there is something in this Charter to the contrary, it would necessarily follow, that in what relates to the peremption of an appeal, the same cause which would operate to perempt an appeal here will perempt an appeal in the Court of Admiralty at *Bombay*.

This being so, the next step is to advert to that part of the Charter which gives power to appeal to the Queen in Council, and then to see whether, on the fair construction of that Charter, it can be construed as changing or altering the effect of that part of it, to which I have already adverted. It is in these words:—"And we do hereby direct, establish, and ordain, that if any person or persons shall find him, her, or themselves aggrieved, by any judgment or determination of the Supreme Court of Judicature at *Bombay*, in any case whatsoever, it shall and may be lawful for him, her, or them, to appeal to us, our heirs or successors, in our or their Privy Council, in

(*a*) 4 Geo. IV., c. 71, sec. 7.

such manner and under such restrictions and qualifications as are hereinafter mentioned, that is to say, in all judgments or determination made by the Supreme Court of Judicature at *Bombay*, in any civil cause, the party or parties against whom, or to whose immediate prejudice the said judgment or determination shall be or tend, may by his or their humble petition, to be preferred for that purpose to the said Court, pray leave to appeal to us, our heirs or successors, in our or their Privy Council, stating in such petition the cause or causes of appeal; and in case such leave to appeal shall be prayed, by the party or parties who is or are directed to pay any sum of money, or to perform any duty, the said Court shall and is hereby empowered to award, that such determination or judgment shall be carried into execution, or that sufficient security shall be given;" and then it directs that security shall be given for the costs, and for performance of judgment.

It does not appear that in this, or any subsequent clause, there is any immediate reference to the Court of Admiralty, or to that part of the Charter which established the Court of Admiralty at *Bombay;* and, consequently, that part of the Charter which establishes the Court of Admiralty at *Bombay*, and directs the proceedings to be according to the rule of the High Court of Admiralty here, must prevail, unless we can find in any part of this Charter something that shall counteract that clause, and direct another mode of proceeding.

Now it appears to us that it is quite impossible, with reference to those general words, to draw any other inference. It is not necessary to consider, whether the clause as to appeals may in any way affect

1851.

LOUGHNAN v. HAJI JOOSUB BHULLADINA.

The Hydroos

the time within which the appeal shall be granted; because the proper question to be considered and determined now, is not a question as to the ordinary right to appeal, or the time and manner in which the appeal shall be asserted, or within what period it shall be asserted; it is simply this question, whether certain acts done in the Court of Admiralty of *Bombay*, are or are not a peremption of the right of appeal. We are of opinion, therefore, that the rule and practice of the High Court of Admiralty must necessarily prevail in governing the proceedings of the Court of *Bombay*, and that, consequently, this appeal has been altogether perempted.

Another difficulty arose in this case, to which it may be necessary slightly to advert; instead of appearing under protest, as is the ordinary course where the party who is cited to appear denies the right to appeal, an absolute appearance was given in this case; and the objection is now taken at the bar for the first time, though it is introduced in the case which the Respondents have presented. It appears to us, that though it is very inconvenient, and this course of proceeding exposed the parties to considerable additional expense, yet that it cannot have the effect of preventing that which had taken place, namely, the peremption of the appeal, at a time long antecedent. And it may be well to observe here, with regard to the leave to appeal, given by the Court at *Bombay*, it is quite obvious that, acting as the High Court of Admiralty there, if the appeal had been once perempted, it was beyond the power of the Court to make any order allowing the appeal to be prosecuted.

We think, therefore, that it is clearly shown that this appeal was entirely perempted by the transactions

of the 5th of *April*; that it is impracticable in any legal view of the case to revive the proceedings, when they are once perempted, and that it would not be within the power of the Court of Admiralty to grant the appeal under any circumstances of mistake or difficulty whatever. We think also, that the circumstance of the Respondents not appearing under protest, though attended with inconvenience to the parties, cannot by possibility affect their right in this case. For these reasons we are under the necessity of pronouncing in favour of the objection which has been taken, that the Appellants are not at liberty to proceed further in this appeal. It must, therefore, be dismissed; but looking at all the circumstances of the case, their Lordships are of opinion that no costs ought to be given (*a*).

(*a*) In *Casement* v. *Fulton*, 3 Moore's Ind. App. Cases, 395, the question whether the rules of the Ecclesiastical Courts in Doctors' Commons, relating to per-emption of appeals, applied to an Ecclesiastical cause in the Supreme Court at *Calcutta*, so as to deprive a party of the Charter right to appeal within six months from the date of the decree was raised, but no decision was given upon that point.

As to the practice of objecting to the competency of an appeal, see *Shire* v. *Shire*, 5 Moore's P. C. Cases, 81.

BABOO KASI PERSAD NARAIN - *Appellant,*

AND

MUSSUMAT KAWALBASI KOOER, BABOO GOOR PERSAD NARAIN, and KALLI PERSAD NARAIN - - } *Respondents.**

On appeal from the Sudder Dewanny Court at Bengal.

19th, 21st & 22nd Feb., 1851.

A claim to real and personal estate under a *tumleeknamah* (deed of gift), against a party to whom possession had been given by the *Fowjdarry* Court, rejected, under the circumstances, the deed not being sufficiently proved.

Pending the appeal to *England*, the sole Appellant died, and the *Sudder* Court made an order substituting one of the Respondents in his stead as Appellant. *Semble:* It is not competent to the other Respondents to object to such order at the hearing of the appeal, the proper course being to move the *Sudder* Court to discharge such order.

In a case of great delay by the officers of the *Sudder Dewanny Adawlut*, at *Calcutta*, in not forwarding certain depositions filed in the cause, which had been omitted in the transcript forwarded to *England*, the Judicial Committee peremptorily ordered the *Sudder Dewanny* Court forthwith to transmit the omitted evidence to *England*.

THIS appeal arose out of a suit instituted in the Provincial Court of *Patna*, by *Sheo Das Narain*, since deceased, against the Respondent, *Mussumat Kawalbasi Kooer*, the party in possession, *Baboo Urremurdun Narain*, also since deceased, and the present Appellant, *Baboo Kasi Persad Narain*. The object of the suit was to obtain possession of the real and personal estate of one *Bahore Narain*, deceased. The parties were members of a tribe or family called *Chowdhyas*, and their relationship appears from the following statement. *Bahore Narain*, *Bal Narain*, and *Ootum Narain* were full brothers. *Bahore Narain*, the eldest

* Present: Members of the *Judicial Committee*,—Lord Langdale, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

brother, had no male issue, but a daughter, *Kawalbasi Kooer*. *Bal Narain* had two sons, *Sheo Das Narain* and *Kasi Persad Narain*. *Ootum Narain* had one son, named *Urremurdun Narain*. It was not in question in the suit that the brothers constituted a divided Hindoo family, or that the property in dispute was not the sole and exclusive property of *Bahore Narain*, in which his brothers had no right to participate.

Bahore Narain died in *October*, 1816, leaving a daughter, *Kawalbasi Kooer*. She lived with him, and was in possession at the time of his decease, when disputes as to her right and possession of the property arose between *Bahore Narain's* nephews, *Kasi Persad* and *Urremurdun Narain*. These disputes led to the interference of the local authorities, and on the 6th of *November*, 1815, the magistrate of the *Zillah* of *Sarun* ordered that she should continue in possession of the effects and property left by *Bahore Narain*, as it appeared that after his death the whole of it came into her possession. *Sheo Das Narain* then came forward and presented a petition to the Circuit Court, in which he rested his title to the disputed property on a *tumleeknamah*, or deed of gift, which he alleged had been executed in his favour by *Bahore Narain*, on the 27th of *December*, 1809. The Court refused to interfere, and referred him to a Civil Court.

The plaint was filed in the Provincial Court of *Patna*, on the 21st of *February*, 1817, by *Sheo Das Narain*, against *Mussumat Kawalbasi Kooer*, *Baboo Urremurdun Narain*, and *Baboo Kasi Persad Narain*, to recover possession of the *khiraj* and *lakhiraj* lands, and the personal estate of the late *Bahore Narain*,

1851.

BABOO KASI PERSAD NARAIN v. MUSSUMAT KAWALBASI KOOER.

then in the possession of his daughter, the Defendant, *Mussumat Kawalbasi Kooer*. It alleged, that *Bahore Narain*, the paternal uncle of the Plaintiff, having no sons living to succeed him, on the 27th of *December*, 1809, executed in the Plaintiff's favour a *tumleeknamah* (an instrument in the nature of a deed of gift), whereby he constituted him, the Plaintiff, proprietor of the whole of his property, real and personal, with the exception of *kismut Umnour* and *Madhapore*, appertaining to *pergunnah Bal*, which he gave to *Mussumat Kawalbasi Kooer*, and that while he (the Plaintiff) was at *Calcutta*, *Bahore Narain* wrote several letters to him to come to him, and that while he was on the road, *Bahore Narain* died.

Mussumat Kawalbasi Kooer, by her answer, charged the Plaintiff with fraudulently combining with the Defendants, *Urremurdun Narain* and *Kasi Persad Narain*, to set up the deed of *tumleeknamah*, which she submitted was a forgery, and only brought forward after an unsuccessful claim made by *Kasi Persad Narain* to the property in dispute, as the *kurta-puttra* (*a*) of *Bahore Narain*; she denied the allegation of the plaint, that *Bahore Narain* was induced to grant away the property, by the *tumleeknamah*, because he had no son or heir, and submitted that she was entitled by right of inheritance to succeed, for that, according to the *Sastras*, if a person had no son, but a daughter, his daughter stood in the place of his son, and was the rightful heir to the property, and, moreover, that she had male offspring, the grandsons of the deceased. And she further insisted, that the claim of the Plain-

(*a*) A fatherless son adopted by a person desirous of male issue. A son made (*Critrima*). See the *Mitacshara*, ch. i. sec. ix. par. 17.

tiff, under the *tumleeknamah*, was illegal and void, as the law required that the person in whose favour the *tumleek* shall have been made, should have been put in possession at the time of the grant, which the Plaintiff admitted had not been done.

The Defendant, *Baboo Urremurdun Narain*, died before putting in his answer, leaving *Baboo Goor Persad Narain Sing* and *Baboo Kalli Persad Narain Sing*, his sons and heirs, who were admitted by the Court to defend the suit. The answer of these Defendants traversed the fact of the execution of the *tumleeknamah*, and claimed for themselves a moiety of the property in dispute as the heirs of their father, the deceased *Urremurdun Narain*, the nephew of *Bahore Narain;* the other moiety belonging, as they alleged, to the Defendant, *Baboo Kasi Persad Narain;* they relied upon an alleged rule of the *Chowdhyas*, that upon the demise of any one without issue, his property devolved to his brother's sons; and they denied the right of the Defendant, *Mussumat Kawalbasi Kooer*, to the property, and prayed that the Court would declare their rights agreeably to the rule observed by the *Chowdhyas* (*a*).

The Defendant, *Kasi Persad Narain*, by his answer, set up a title to the estate, as *kurta-puttra* of *Bahore Narain*, alleging that he had performed his funeral rites, and as such adopted son claimed to succeed to his property; and he further relied on his title as a co-sharer with his brother, according to the custom of the family of *Chowdhyas*, and submitted that, even if the *tumleeknamah* was executed as alleged, it did not deprive him and his near relatives of their right and interest in the deceased's estate.

(*a*) The title of a particular tribe of Brahmins.

1851.

BABOO KASI PERSAD NARAIN v. MUSSUMAT KAWALBASI KOOER.

The suit being at issue, the Plaintiff produced as evidence the *tumleeknamah* under which he claimed. The material part of this document was in these terms :—" I grant and give *kismut Umnour* and *Madhapore*, in *pergunnah Bal*, to *Mussumat Kawalbasi Kooer*, my daughter, for her food and raiment, and have given a separate and distinct *thika-putta* in her name. On which account, I do declare and give, in writing, that, with the exception of the said *kismut*, whatever I have in my possession and occupation; such as *mowgahs* and lands, which pay; and those which do not pay, public revenues, and the *havellies*, and ready moneys and goods, and household effects, slaves and slave girls, all things which may be denominated 'property,' and constituting the estate; also, all my right and title, and legal debts, I grant, give, and transfer to *Sheo Das Narain*, son of *Baboo Bal Narain*, son of *Baboo Gopal Narain*, my own brother's son, and have made a *tumleek*. The *tumleek* is good and legal, although the property remains in my possession, in the shape of a charge; and hereafter I have not, on my right and title, any claim or demand, or hold in any way whatsoever against the donee as respects the aforesaid declaration. Should a son chance to be born to me, and he live, then the donee and such son shall be in entry and occupation of the said estate gifted away, share and share alike." This document purported to be attested by nine witnesses, and had the seal of the *Kazi* affixed.

The Plaintiff put in also several letters purporting to have been written and sent to him by *Bahore Narain*. The Defendant, *Mussumat Kawalbasi Kooer*, filed the proceedings of the *Foujdarry* Court, in the proceedings between her and *Kasi Persad Narain*, by

which her title to the real and personal estate of the late *Bahore Narain* was acknowledged, and possession of his estate decreed her; she also filed the proceedings of the Collector, substituting her name for that of *Bahore Narain*. There were also brought up from the records, and read, the proceedings of the *Foujdarry Adawlut*, in which *Kasi Persad Narain* was Complainant, and *Mussumat Kawalbasi Kooer* was Defendant.

Upon this evidence, the Provincial Court of *Patna*, by a decree, dated the 25th of *March*, 1818, declared that, "As the whole of the landed and moveable property had been divided between the late *Bahore Narain* and his brothers, and as all three were living in separate abodes, and severally paid the public revenues, and neither had any concern with the other, therefore it was evident, and was universally allowed, that the proprietors of the whole of the property and effects left by *Bahore Narain*, were *Mussumat Kawalbasi Kooer*, his daughter, and his grandsons born of this daughter, and that the brothers' sons had no right and title to the property, and the *tumleeknamah* advanced by the Plaintiff was not at all to be credited. That it was clear that the possessor of the *tumleeknamah* should have entry and possession, while, indeed, the Plaintiff admitted that he had not entry and possession during *Bahore Narain's* lifetime. Hence, had the *tumleeknamah* been a genuine one, it would have been rendered illegal by reason of the absence of entry and possession of the effects. On which account, it appearing to be useless and of no benefit to call for witnesses on the part of the Plaintiff," it was ordered, that the Plaintiff's claim be dismissed with costs.

1851.

BABOO KASI PERSAD NARAIN v. MUSSUMAT KAWALBASI KOOER.

From this decree the Plaintiff appealed to the *Sudder Dewanny Adawlut* at *Bengal*, submitting that the decision was erroneous, as the same had been made without hearing witnesses whose testimony would have established his claim.

The *Sudder Dewanny Adawlut*, being of opinion that the examination of such witnesses was necessary, without entering into the merits of the appeal, remitted the cause to the Provincial Court to hear evidence on both sides.

In pursuance of the above order, the Court proceeded to take evidence.

Twenty witnesses were examined on behalf of *Sheo Das Narain*, five of whom stated that they had attested the *tumleeknamah*. Four stated that *Bahore Narain* had, in conversation, admitted the execution of the deed. One of them was the *Kazi* who attached his seal to the instrument. Five other witnesses deposed that they were present when the letter was written by *Bahore Narain* to recall *Sheo Das Narain*. Twenty-two witnesses were examined by *Mussumat Kawalbasi Kooer* to establish that *Bahore Narain* had, during his lifetime, adopted her and her two sons as his successors and heirs of his property, and had recognized them in the presence of relatives during the funeral ceremonies of his third wife in *September*, 1816. And in order to prove that the *tumleeknamah* was a forgery, five of the witnesses deposed that *Bahore Narain* had departed from home for the purpose of performing a pilgrimage, a short period previous to its professed date. Witnesses were also brought forward by *Goor Persad Narain* for himself and his brother, with the view of proving the rule of succession he had alleged. And witnesses were exa-

mined by *Kasi Persad Narain* to prove the same rule of succession, and also that he had been appointed by *Bahore Narain* to perform his funeral ceremonies, in the event of *Sheo Das Narain* not arriving in time from *Calcutta*.

The appeal, with the additional evidence remitted by the Provincial Court, came on for hearing before Mr. *Courtney Smith*, the second Judge of the *Sudder* Court, who, on the 2nd of *May*, 1821, with a view of obtaining an exposition of the Hindoo law upon the subject, ordered the *tumleeknamah* to be laid before the Pundits attached to that Court, upon the following questions:—

"First. Should *Baboo Bahore Narain* (on whose part the instrument in question was written) have had, in addition to *Kawalbasi Kooer*, his daughter, and *Sheo Das Narain*, a brother's son (mention of both of whom is to be found in the instrument), two other own brothers' sons, had he the power to execute an instrument of the nature in question, or not?

"Second. Seeing that *Bahore Narain* survived the execution of the aforesaid instrument nearly seven years, and held entry and possession as usual, of the whole of the landed property and effects made mention of in the instrument in question, and died in the same month; under these circumstances, do the landed property and effects mentioned in the instrument aforesaid go after his death to the abovenamed *Sheo Das Narain*, or not?

"Third. In the event of the instrument under consideration turning out to be invalid, and the property not to be *Sheo Das Narain's* under the document, do the effects left by *Bahore Narain* go to his daughter, *Mussumat Kawalbasi Kooer*, or to his brothers' sons,

1851.

BABOO KASI PERSAD NARAIN v. MUSSUMAT KAWALBASI KOOER.

of whom two are the sons of one of his brothers, and the third the son of another brother?

"Fourth. If the effects devolved to his brothers' sons, do they enjoy the property in equal portions each, or does one moiety of it go to one of the nephews, and the remaining half to the two, who are full brothers to each other?"

The Pundits attached to the Court returned the following *bewusta* to these questions:—

"First. Should *Bahore Narain* have executed the instrument in question, making mention in it of the name of his daughter, *Kawalbasi Kooer*, and of *Sheo Das Narain*, his brother's son, even while he had, in addition to these, two own brothers' sons, yet he had, under the *Sastras* in force in the western parts of the country, the power to execute an instrument of this nature in favour of *Sheo Das Narain* aforesaid, provided no other person had interest in *Bahore Narain's* property, because to a divided or separated individual who may be proprietor of property, and may have only a daughter, and who can, according to his own wishes, make a donation, or otherwise, of his own effects, there is no bar by the existence of his brothers' sons. But should the property be undivided, he had no power to execute the instrument, because, of those who have co-interest in the property one alone cannot make a sale, or a gift, or otherwise, of it. According to the *Sastras*, however, that are extant in *Bengal*, *Bahore Narain* had full power over the effects, whether they were divided or undivided. A text of *Nareda Mooni* is in proof of this—'The proprietor of property can make a sale or a donation, &c., of his portion of property.'

"Second. Should *Bahore Narain* have executed a

tumleeknamah of the description under consideration in favour of *Sheo Das Narain*, and from the date of its execution to the day of his death, comprising a period of seven years, himself continued in possession and occupation of the property made mention of in the *tumleeknamah*, still under that instrument the landed property and effects stated in it shall go to *Sheo Das Narain* after *Bahore Narain's* decease; for in the *tumleeknamah* it is written, 'I have given to *Sheo Das Narain* the whole of my property, and have executed this *tumleeknamah* in his favour, although the property remains in my custody in the shape of a charge.' Hence the *tumleek* under consideration is free of condition, and the right and interest of *Sheo Das Narain*, which were generated in the property mentioned in the *tumleeknamah*, so soon as it was executed in the lifetime of the donor, cannot be vitiated by his being in possession of the effects mentioned therein subsequent to the execution of the instrument, nor can the right and title of the executor of the *tumleeknamah* be again created.

"Third. Should, by any means, the instrument in question be nullified, and the right and title of *Sheo Das Narain*, grounded on the instrument, be not established, in that case the effects left by *Bahore Narain* will go to *Kawalbasi Kooer*, his daughter, according to the *Sastras* extant in the western parts of the country, provided the property shall have been divided; but if it be an undivided property, it goes to the brothers' sons, and according to the *Sastras* extant in *Bengal*, the property shall devolve to *Bahore Narain's* daughter, whether it be divided or undivided. In proof of this is the text of *Yagnyawalcya*, as follows:—'If a person die, leaving neither son nor son's son, his property

1851.

BABOO KASI PERSAD NARAIN v. MUSSUMAT KAWALBASI KOOER.

goes, in the first instance, to his widow; should there be no widow, it goes to the daughter; should there be no daughter, to the daughter's son; should there not be a daughter's son, it goes to the deceased's father and mother; non-existing whom, to the brother; and if he be not existing, to his brothers' sons, and others, according to rotation.'

"Fourth. Should it turn out that the brothers' sons have right and title in the property, the right of each is equal to the others. In proof of this is the text of *Yagnyaiwalcya*, which has been cited in support of the answer made to the third question."

On the 9th of *May*, 1821, Mr. *Courtney Smith* recorded his opinion, that the claim of the Plaintiff, as regarded the personal property, should, by reason of its not being sufficiently defined, and from its not appearing clear that the property came into the Respondent's possession, be dismissed, but that, on the ground of the execution of the *tumleeknamah* being sufficiently proved, the decree of the *Patna* Provincial Court should, as respected the lands, be annulled.

The proceedings were then laid before Mr. *Thomas Goad*, the third Judge of the *Sudder* Court, and Mr. *William Dorin*, the officiating Judge. Mr. *Goad* recorded his opinion upon the merits on the 11th of *June*, 1821, that the *tumleeknamah* was unworthy of credit, and that the decree of the Provincial Court should be affirmed. Mr. *Dorin* recorded his opinion on the same day, that the *tumleeknamah* was sufficiently proved, and that the Plaintiff's claim to the real and personal property was valid and good, and that further evidence should be taken with regard to the extent of the moveable property. As none of the three opinions thus given agreed, it was ordered that

1851.

BABOO KASI PERSAD NARAIN v. MUSSUMAT KAWALBASI KOOER.

the proceedings should be laid before the Chief Judge of the Court.

The cause then came before Mr. *William Leycester*, Chief Judge, who concurred in the opinion recorded by the third Judge, that the appeal should be dismissed, and, on the 14th of *August*, 1821, pronounced the decree of the *Sudder* Court, in these terms: "It appears that although witnesses on the part of the Plaintiff (now the Appellant) have borne testimony to the genuineness of the *tumleeknamah*, still the witnesses of *Mussumat Kawalbasi Kooer*, one of the Respondents (formerly a Defendant), speak diametrically opposite to them; therefore, no judgment can be formed upon the evidence adduced; indeed, the evidence of the witnesses of the first-mentioned party has not the superiority over that of the witnesses of the last-mentioned one, so that the Court might place reliance on it. On the other hand, upon various inferences that may be drawn from the proceedings, the truth of the testimony given by the witnesses of the Appellant is very doubtful, especially that which went to state that *Baboo Bahore Narain* did execute a *tumleeknamah* exhibited by the Plaintiff."

From this decree the Appellant presented a petition for a review of judgment.

The petition for review came before Mr. *Courtney Smith*, the second Judge; but as the above decree was in opposition to his opinion, he directed that the petition should be laid before the Chief Judge. This was accordingly done. The Chief Judge recorded his opinion that no review should be allowed; and ordered that the proceedings be laid before the third Judge, who took part in pronouncing the judg-

1851.

BABOO KASI PERSAD NARAIN v. MUSSUMAT KAWALBASI KOOER.

ment, in order that a final order might be issued rejecting the prayer for review of judgment. On the papers being laid before Mr. *Goad*, the third Judge, he stated, that as a fifth Judge was then attached to the Court (Mr. *John Shakespear*), whose opinion on the case might be had, he ordered the papers to be laid before the second and the officiating Judge; and should those Judges see sufficient reason to allow a review of judgment, they would allow it. The proceedings then came before Mr. *William Dorin*, the officiating Judge, who was in favour of a review, and ordered that the papers should be laid before Mr. *John Shakespear*.

The papers were then laid before Mr. *John Shakespear*, who was of opinion that a new trial ought to be allowed; and, accordingly, on the 23rd of *January*, 1823, ordered a review of judgment. In accordance with this order, the proceedings were brought before the fourth Judge and the officiating Judge, Mr. *William Dorin*, who recorded their joint opinion, that before passing a decision in the cause, it was necessary to inspect the original book of the office of the *Kazi*, of the time of *Kazi Mahomed Reza*, for the *Hijra* year 1224 (1809-10, A.D.), in order to ascertain the fact of the seal of that *Kazi* being affixed to the *tumleeknamah* exhibited by the Appellant, and ordered that a copy of the proceeding should be sent to the *Patna* Provincial Court, with directions to forward to the *Sudder Adawlut* the original book in question, proving it by the evidence on oath of the said *Kazi* and his *Naib*.

This was accordingly done, and the witness, in whose custody the book was, was examined as to its contents.

This further evidence having been transmitted to the *Sudder Dewanny Adawlut*, Mr. *John Shakespear*, on the 3rd of *April*, 1823, recorded his opinion, "that the *tumleeknamah* exhibited by the Appellant was fabricated and a forgery, and that the judgment pronounced by the *Sudder Dewanny Adawlut*, on the 14th of *August*, 1821, affirming the judgment of the *Patna* Court of Appeal, bearing date the 25th of *March*, 1818, was good, and such as should be maintained;" and ordered the papers to be laid before the Chief Judge of the Court, in order to a final order being passed, upholding and maintaining the judgment dated the 14th of *August*, 1821.

Upon this the proceedings were again brought before Mr. *Courtney Smith*, who, on the 6th of *May*, 1823, recorded his opinion; that the decision of the Court, dated the 14th of *August*, 1821, and that of the *Patna* Provincial Court, of the 25th of *March*, 1818, should be annulled; and that, on the ground of the *tumleeknamah* being proved, a decree should be pronounced and issued in favour of the Plaintiff for the lands, and also for the moveable property to be ascertained by inquiry.

On the 4th of *June*, 1823, the case came before Mr. *William Dorin*, who considered that the opinion given by Mr. *John Shakespear*, rejecting the *tumleeknamah* as a forgery, ought to be treated as finally terminating the suit. He, therefore, declined to go further into the case, and directed the papers to be laid before the Chief Judge, that a final order might be passed.

The final judgment of the Court was delivered by the Chief Judge, Mr. *William Leycester*, on the 5th of *July*, 1823, as follows:—"Upon a due deliberation of the whole of the papers in the case, and the circum-

1851.

BABOO KASI PERSAD NARAIN v. MUSSUMAT KAWALBASI KOOER.

stances and bearings of it, there does not appear to the sitting Judge any good and sufficient reason upon which to reverse the judgment pronounced by this Court on the 14th of *August*, 1821, which went to affirm the decision of the *Patna* Provincial Court, dated 25th of *March*, 1818, and to dismiss the Appellant's claim; indeed, as the judgment has turned out in every way to be a good one, and such as should be upheld, for these reasons a final order and decree is given in concurrence with the opinion of the third Judge of this Court, Mr. *Shakespear*, recorded in his proceedings, under date the 3rd of *April* of the current year, that the judgment of the *Sudder Dewanny Adawlut*, bearing date the 14th of *August*, 1821, is maintained and upheld, with costs." (*a*.)

Sheo Das Narain appealed from this decision to His late Majesty in Council. Pending the appeal, and in the year 1831, *Sheo Das Narain* died without issue, leaving *Het Koonwur*, his widow, surviving. At his decease, his brother, *Kasi Persad Narain*, claimed to be his heir. His widow, *Het Koonwur*, also claimed to be heir. The *Sudder* Court directed the *Zillah* Court of *Sarun* to take the examination of witnesses as to the right of succession of the above-mentioned persons to the deceased. Evi-

(*a*) This case is reported, *nom.* "*Baboo Sheodas Narain* v. *Kunwul Bas Koonwur*," 3 Ben. Sud. Dew. Reps. 234, upon a question of practice respecting the application for review of judgment; the *Sudder* Court holding, that in a case of review of judgment, two Judges being of opinion that the decree reviewed should be reversed, and two that it should be affirmed, one of the latter having joined in passing the decree reviewed, and the Judge who concurred with him in that decision being since dead, the opinion of the deceased Judge should be taken into account, so as to create a majority, without the necessity of calling in a fifth Judge.

1851.

BABOO KASI PERSAD NARAIN v. MUSSUMAT KAWALBASI KOOER.

dence was accordingly taken by the Court at *Sarun*. On the 7th of *June*, 1834, *Het Koonwur* presented a petition to the *Sudder* Court at *Calcutta*, stating that an adjustment and deed of compromise had taken place between her and *Kasi Persad Narain*, and praying that his name might be written in lieu of her deceased husband, as the Appellant to *Europe*. In this application *Kasi Persad Narain* concurred. By an order of the *Sudder* Court, dated the 19th of *May*, 1836, it was ordered, that the name of *Kasi Persad Narain* should be substituted in lieu of that of *Sheo Das Narain*.

After the receipt of the transcript in *England*, it was discovered that it was defective, by reason of the omission of the depositions of certain witnesses whose evidence had been taken in the cause, and, on the 21st of *April*, 1841, application was made to the Registrar of the *Sudder Dewanny Adawlut*, for copies of those depositions. To this application a return was made of a portion only of the depositions, whereupon further applications were made to the Registrar for the remaining depositions and proceedings, but without effect. In consequence of this neglect and refusal on the part of the Registrar, both the Appellant and Respondents, in 1849, presented petitions, entitled in the appeal, to the Judicial Committee of the Privy Council, praying that a peremptory order might issue to the *Sudder Dewanny Adawlut*, directing them forthwith to transmit to the Judicial Committee copies of the omitted depositions, which their Lordships accordingly ordered; but before this order was served in *India*, the required depositions were forwarded to *England*.

The appeal now came on for hearing.

1851.

BABOO KASI PERSAD NARAIN v. MUSSUMAT KAWALBASI KOOER.

Mr. *Turner*, Q. C., Mr. *Forsyth*, and Mr. *Maule*, for the Appellant.

The sole question is the genuineness of the *tumleeknamah*, which involves two considerations; one of fact, whether it was executed by *Bahore Narain*; and secondly, if executed by him, whether it is valid in point of law. Upon the evidence we submit, that the execution of the deed was satisfactorily proved. Five of the witnesses examined were attesting witnesses, another was the *Kazi*, who affixed his seal to the instrument: his evidence as to its authenticity is conclusive. *Musnud Ali* v. *Khoorsheed Banoo* (*a*), Ben. Regs. XXXVI. and XXXIX. of 1793. The opinions of the Pundits establish that *Mussumat Kawalbasi Kooer* was heiress of *Bahore Narain*, if he had made no deed of gift, but that he, being the owner of divided property, had power to dispose of it, 1 *Strange's* Hindoo Law (2nd Edit.), p. 25; 2 *Strange's* Hindoo Law, pp. 5, 428 and 436. The gift was good, though not accompanied by possession, 2 *Strange's* Hindoo Law, p. 5.

Mr. *Wigram*, Q. C., Mr. *Lloyd*, Q. C., and Mr. *Edmund F. Moore*, for the Respondents.

It is not competent for the present Appellant to sustain this appeal. The character of the parties to the original suit has been completely changed. *Kasi Persad Narain* was a Defendant in the original suit, and the evidence taken was entitled in that suit, and cannot now be used upon a substitution of parties; in his answer he impeached as a forgery the very instrument he now relies upon as the foundation of his title. The order of the *Sudder* Court was wrong, for it substituted *Kasi Persad Narain* as Appellant by virtue of a

(*a*) 1 Ben. Sud Dew. Rep. 52.

compromise with a party who had no right to sue.—[Lord *Langdale*: This Court cannot question the validity of the order substituting *Kasi Persad Narain*; if you were prejudiced, you should have moved the Court below to have discharged the order. *Cholmondeley* v. *Clinton* was a similar case of substitution of parties.]

The case of the Appellant is then confined to the *tumleeknamah* of the 27th of *December*, 1809. The Courts in *India* have held upon the evidence that this instrument is forged. But even if it had been executed as alleged, still it would have been imperative and void by the Hindoo law, by reason of the donor retaining possession until his death, in 1816. 1 *Strange's* Hindoo Law (2nd Edit.), p. 32. The Respondent, *Mussumat Kawalbasi Kooer*, is the heiress at law of *Bahore Narain*, and in possession; and to render such gift valid, her consent was necessary, 1 *Strange's* Hindoo Law, p. 19; the burden of proof is upon the Appellant claiming under this deed, which he has failed to establish. The effect of the evidence of the *Kasi* is settled by Ben. Regs. XXXVI. of 1793, sec. 6, and XXXIX. of 1793, secs. 1 and 9.

The Right Hon. T. PEMBERTON LEIGH:

Bahore Narain, whose property is the subject of the present litigation, died on the 2nd of *October*, 1816. He left a daughter, who, it is now admitted, was his heiress, and two grandsons, children of that daughter. He appears to have had several nephews. On his death, his daughter, who lived with him, remained in possession of his property.

Some of the nephews attempted to disturb that possession. One of them set up a claim as *Kurta-puttra*

1851.

BABOO KASI PERSAD NARAIN v. MUSSUMAT KAWALBASI KOOER.

of the deceased. Another produced a deed of heirship, in which the title of the two nephews of *Sheo Das Narain* was recognised, and under those different claims they attempted to turn *Mussumat Kawalbasi Kooer*, the daughter, out of possession. This led to a dispute in the *Foujdarry* Court, and there it was finally determined that whatever litigation was to take place, must take place in the Civil Court, and that in the meantime the daughter should be left in possession of the property.

In 1817, the plaint in this suit was filed by *Sheo Das Narain*, who seems to have been absent at the time when *Bahore Narain* died. After a great many intermediate proceedings, and very great difference of opinion among the Judges in the Court below, in 1823 a decision was finally pronounced in favour of the Respondent, *Mussumat Kawalbasi Kooer*. Liberty to appeal was granted, and from that time to 1836, we have no evidence of what took place as regards the prosecution of that order for liberty to appeal. In 1831 the original Appellant died. Litigation arose with respect to the heirship, which was completed in 1836, and the order to substitute the now Appellant came over in 1839; and from that time to the present the delay seems to be sufficiently accounted for, by the difficulties which occurred in obtaining copies of the proceedings. But the fact is, that from 1816, when *Bahore Narain* died, to the year 1851, in which we are disposing of the question, possession under a judicial title of some sort or other has remained with the Respondent, *Mussumat Kawalbasi Kooer*, and it certainly would require a strong case to induce a Court of Justice to overturn that possession, under such circumstances.

1851.

BABOO KASI PERSAD NARAIN v. MUSSUMAT KAWALBASI KOOER.

We are very far from saying, that there is not very great difficulty in this case. But the question which we have to consider is, first, whether the *onus* lying on the Appellant, that is to say, on the person whom the present Appellant has succeeded, to establish his case against the heir, we are so satisfied, that such a case was established in the Court below, that against the opinions of the Judges, upon a point merely of fact and the value of evidence, we can safely recommend Her Majesty to overturn the judgment.

The case which is set up on the part of the Appellant is this. He says, that on the 27th of *December*, 1809, *Bahore Narain* having a great regard for *Sheo Das Narain*, his nephew, and having no male heir, executed this instrument, and took it either on the 29th or 30th of *December*, to the *Kazi*, to have it attested by his seal, which seems to have very much the effect of a notarial registration of the instrument. From that time until the period of the grantor's death, no attempt was ever made to alter that instrument. He was absent at *Calcutta* at the time when the grantor died, and he was sent for; he came as soon as he could; before he arrived the grantor had died, and he brought forward this claim as soon as it was possible for him to do so, consistently with the circumstances in which he was placed.

With respect to this deed, there is certainly a great deal of evidence, not at all more liable to suspicion than all Hindoo testimony unfortunately is, as to its execution at the time at which it is represented to have been executed. With respect to the direct parol testimony upon the point, we can give very little weight to it. It seems to us to be utterly improbable, if not impossible, that two or three officers who were

1851.

BABOO KASI PERSAD NARAIN v. MUSSUMAT KAWALBASI KOOER.

in the habit of putting their seals to instruments very frequently, should recollect in the year 1820, what took place in the year 1809, the conversation which then passed, and the explanation which was then given by the party who brought the deed, as to what the contents of that deed were, and that they should depose as to all this, with a particularity which, if the circumstance had happened only a week before, could hardly, in ordinary cases, have been expected, unless there were some particular reason or other for its having made so strong an impression upon their minds.

On the other hand, there is evidence, probably of very little value, but there is the evidence of parties on the other side, who, if they swear truly, swear that it is impossible that any such deed could have been executed. One set of witnesses swear that the grantor was absent from the place where the deed is said to have been executed, at the time of its execution; another set of witnesses swear that they were called after the grantor's death to witness this instrument, which was admitted to have been a fabricated instrument. No doubt there is great improbability in the statement of the last set of witnesses, and very little reliance to be placed on the witnesses on the other side.

The peculiarity of the case seems to depend upon that part of the evidence which arises from the *Kazi's* book; and certainly, if nothing more had appeared to us, except that that book had been produced with the signature of the *Kazi* at the beginning, and the signature of the English Judge at the end, that book appearing to have been regularly kept, and this document entered there, it would have been such evidence

as, notwithstanding all the difficulties of the case in other respects, would have induced us to say, that we should not recommend Her Majesty to confirm the judgment which had been pronounced. But when we look to the evidence by which that instrument is explained, it appears to us, that all or nearly all the value of that testimony is removed. It is said, that by the Regulation of 1793, it was the duty of the *Kazi* to keep copies of the instruments which they executed, and it appears to have been so. A witness however states, that *Kazis* in that neighbourhood were not aware of that Regulation, that no orders had been issued to that effect to them, but that they were in the habit of keeping copies for their own satisfaction. How those books of the *Kazis* were bound, or in what form they were, does not very clearly appear; but it seems, that at some period, which must have been after *March*, 1818, all the books of the *Kazis* in that district were called for by the Judge of the *Zillah* Court, that they were all sent in to him, and that then those books appear to have been made up into volumes, and they were directed in future to keep records of these instruments in volumes, and then those things having been thus divided, and apparently made up for each year, the *Kazi* and the Judge, one at the beginning and the other at the end of the document, affixed their signature as an authentication of it.

If this had been done before 1809, no doubt it would have had the greatest possible weight; but not being done till after 1809, and till after this litigation had occurred, for it is clear it was after *March*, 1818, because the *Kazi* brought in his book up to *March*, 1818, and this plaint was filed in 1817; the whole

1851.

BABOO KASI PERSAD NARAIN v. MUSSUMAT KAWALBASI KOOER.

value of that evidence appears to us to depend upon this, is there sufficient proof before us, that there could be no interpolation of this document in the interval between the year 1816, when it was first mentioned by the parties who produced it, and the period of *March*, 1818, or the subsequent period, at which those records were made up and authenticated in the manner I have stated? We do not think, considering the nature of the testimony given upon that point, that it affords sufficient grounds for us to decide against the opinions which have been come to below, there being great discrepancy among the Judges, and perhaps not, upon the whole, very satisfactory reasons given by them.

In the result, therefore, considering that the *onus* is upon the Appellant, considering, as some of their Lordships are of opinion, that the probabilities of the case, independently of the evidence, are rather against than in favour of the deed, considering that the Judges of the Court below have decided against the claim of the Appellant, and that, for at least twelve years, we have no satisfactory account of the reasons which occasioned the postponement of this appeal, we think it would not be safe to advise Her Majesty to reverse the judgment. But as there is so much doubt upon the case, and there has been so much difference of opinion among the Judges who decided it, that though we shall recommend the appeal to be dismissed, we shall not think it fit to give any costs against the Appellant.

RAWUT URJUN SING and RAWUT DOORJUN SING - - - - } *Appellants,*

AND

RAWUT GHUNSIAM SING - - *Respondent.**

On appeal from the Sudder Dewanny Court at Allahabad.

18th June, 1851.

Family usage and custom, for eight generations, for a *Zemindary* estate in *Bengal*, to descend entire to the eldest son, to the exclusion of the other sons, sustained.

So held, in a suit by younger brothers against the eldest brother, for a partition of the *ilaka* of *Rawutpore*.

THE question in this appeal arose out of a claim made by the Appellants to succeed with the Respondent, as co-heirs of their father, *Girdhur Sing*, to the *ilaka* of *Rawutpore*, consisting of twenty-two villages, situate in the *Zillah Cawnpore*, in *Bengal*.

The Respondent was the eldest son by the first wife of *Girdhur Sing*, the *Raja* or *Rawut* last seised of the *ilaka* of *Rawutpore*. The Appellants were the sons of *Girdhur Sing*, by a second marriage. The Respondent insisted that, according to the usage and custom of the family, the *ilaka* of *Rawutpore* was ancestral estate and indivisible, and devolved on the eldest son, and claimed the entire *ilaka* as his inheritance. The Appellants denied the existence of such family custom, and insisted on the partibility of the estate, and that the same devolved, at the decease of their father, on all the sons as co-heirs.

The following genealogical statement of the family, and of the succession to *Rawutpore*, appeared from

* Present: Members of the *Judicial Committee*,—The Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

1851.

RAWUT URJUN SING v. RAWUT GHUNSIAM SING.

the evidence in the cause. *Rawut Kheem Kurn* was the common ancestor and first possessor of *Rawutpore;* he had two sons, one named *Mokhum Sing*, and the other *Dhurm Sing*. At the death of *Rawut Kheem Kurn*, his eldest son *Mokhum Sing* succeeded to the *musnud* and title of *Rawutti*, and to the possession of the entire *ilaka* of *Rawutpore*, and *Dhurm Sing* received maintenance only. *Mokhum Sing* had four sons, and his eldest son *Kullian Sing* succeeded at his death to the *musnud*, to the exclusion of his three brothers. *Kullian Sing* had two sons, and his eldest son *Mitter Sein* alone succeeded to the *musnud*. He had three wives. By the first wife he had two sons, *Kurn Rai* and *Bikramajeet;* by his second wife he had two sons, *Dando Rai* and *Heeramun;* and by his third wife he had five sons, *Ramsuh*, *Beersuh*, *Muthramull*, *Birmh Rai*, and *Raja Ram*. At the death of *Mitter Sein*, his eldest son *Kurn Rai* succeeded to the *musnud*. *Bikramajeet* had four sons, named *Khurg Rai*, *Gunnesh Rai*, *Chunderbun*, and *Roop Sing;* and *Kurn Rai* being childless, adopted *Khurg Rai* as his son, who, in virtue of his adoption, ascended the *musnud*, and obtained the title of *Rawut*. After the adoption of *Khurg Rai*, *Kurn Rai* had a son by his first wife, named *Bussunt Rai*, but by the custom of the family he was held, though legitimate, to be entitled to maintenance only. *Khurg Rai* had two sons, *Pahar Sing*, who, in right of being the eldest son, succeeded to the *Rawutti*, and *Bhoput Rai*, who remained subject to his elder brother. *Pahar Sing* had no issue. *Bhoput Sing*, the younger brother, had issue three sons, named *Man Sing*, *Raja Ram*, and *Khanday Rai;* and *Pahar Sing* being childless, adopted *Khanday Rai*, who succeeded *Pahar Sing* to the title

of *Rawut*, and the possession of the estate of *Rawutpore*. *Rawut Khanday Rai* had issue two sons, named *Zoorawur Sing*, who succeeded his father as *Rawut*, and *Kullian Sing*, who, after the death of his brother *Zoorawur Sing*, without issue, ascended the *musnud*. *Rawut Kullian Sing* had two sons, *Bhugwunt Sing*, who succeeded his father to the *Rawutti*, and *Ameer Sing*, who died without issue. *Bhugwunt Sing* being childless, in his lifetime adopted *Keerut Sing*, son of *Doonud Sing*, one of the descendants of *Raja Ram*, aforesaid, and he succeeded, according to the custom of the family, to the *musnud*. *Rawut Keerut Sing* had only one son, named *Girdhur Sing*, who, after the death of his father, succeeded to the *musnud* and title of *Rawutti*. *Rawut Girdhur Sing* had two wives; by the first wife he had two sons, the Respondent, *Ghunsiam Sing*, and *Bheem Sein*, deceased, and now represented by his son, *Rundheer Sing*; by the second wife he also had issue two sons, the Appellants, *Urjun Sing* and *Doorjun Sing*.

No division of this *ilaka* appeared to have ever taken place, and the eldest son alone succeeded. At the time of *Bikramajeet*, some division of estates took place, but it did not include the *ilaka* of *Rawutpore*.

Rawut Girdhur Sing, by a deed dated the 14th of *April*, 1820, constituted his eldest son, the Respondent, his representative, and nominated him successor and heir to the entire *ilaka* of *Rawutpore*. In 1825, *Girdhur Sing*, at the suggestion of the Appellants, desired the Respondent to allow each of them to have the management of a village of the estate; but the Respondent refused such permission. *Girdhur Sing*, thereupon, to mark his displeasure towards the Respondent, and to induce him to obey, executed an

1851.

RAWUT URJUN SING v. RAWUT GHUNSIAM SING.

instrument, dated the 27th of *January*, 1826, whereby he purported to dispose of his estate equally between the Appellants, who were to have one-half, and the Respondent and *Rundheer Sing*, who were to have the other half. This document, however, was unattested, and it appeared was not intended by *Girdhur Sing* to be a complete instrument, or to be in any respect operative. The Appellants, however, having obtained possession of the document, and insisting that it was valid and authentic, filed a petition in the Court of the Magistrate of *Cawnpore*, claiming their right to have the estate divided between them and the Respondent. In the course of this proceeding, *Girdhur Sing* presented three several petitions to the Magistrate, dated the 13th of *July*, 1826, the 18th of *November*, 1826, and the 19th of *March*, 1827, in which he disavowed this instrument, and declared that, according to the custom of the family, the estate was impartible, and descended entire on the eldest son; he was also personally examined by the Magistrate of *Cawnpore*, before whom he made the following deposition:—"The fact is, I am personally concerned in no dispute; for, as long as I am living, I am the proprietor of my estate, and, of course, maintain my children and relatives. But the custom in my family has been this, through every generation since this estate has come into existence, that the eldest son succeeds to the *musnud*, and the estate is held by him entire and undivided, and that the subsistence of the other sons is provided for. At present my enemies are embroiling my sons, with the view to create some serious dissension in my family, and, only a short time ago, they had so far succeeded as to alienate from me my eldest son, *Ghunsiam Sing*. *Urjun Sing*, upon that occasion, brought to me a docu-

ment which he had prepared in his own way, and I, in order to intimidate *Ghunsiam Sing*, attached my signature to it, and kept it by me; but *Urjun Sing*, without my knowledge, abstracted it, and filed it in the Court. I have neither written nor given to *Urjun Sing* that document, nor has such been the custom of my family; and did I seriously intend to do so, I should have certainly had it attested by witnesses and registered in Court."

The Magistrate, in order to ascertain the existence of the custom, addressed to four neighbouring *Rajas* the following question:—"Whether, in the families of *Raja*, *Rana*, and *Rawut*, the estate is divided among all the heirs, or devolves on the eldest son alone?" To this question *Raja Dan Sing* answered, "That, in the families of all such *Rajas* as receive the *kashka* (or mark of red ochre on the forehead) and sit on *guddies*, the estate is not divided into shares, but that it is customary for the eldest son to succeed his father in the *guddy;* that they continue subject to his authority; and that such has been the custom in his family from ancient times." The other *Rajas* returned answers to the same effect, that the estate was not divided into shares, but that the eldest son alone succeeded to it.

Under these circumstances, the Magistrate dismissed the complaint of the Appellants, stating in his order of dismissal, that *Rawut Girdhur Sing* had full authority to act as he had done in nominating the Respondent as his successor. The Appellants, *Urjun Sing* and *Doorjun Sing*, then instituted a joint action against *Rawut Girdhur Sing*, *Rawut Ghunsiam Sing*, and *Rundheer Sing*, in the Provincial Court at *Bareilly*, for a partition. This claim was dismissed, the Court

1851.

RAWUT URJUN SING v. RAWUT GHUNSIAM SING.

holding that the Appellants had failed to prove that, according to the custom of the family, the estate was divisible. This decree was confirmed, on appeal, by the *Sudder Dewanny* Court at *Allahabad*.

Rawut Girdhur Sing died in 1834; at his death the Respondent succeeded as eldest son, and was placed on the *musnud*. The Appellants applied to the Deputy Collector of the *Zillah Cawnpore* to have their names entered on the registry, jointly with that of the Respondent, as proprietors of the estate in question, which the Collector, without inquiry into the family custom, allowed, and registered their names, with that of the Respondent, in the registry-book of his office. The Appellants then got possession of the *ilaka*.

In consequence thereof, *Rawut Ghunsiam Sing*, on the 24th of *January*, 1838, filed his plaint in the Court of the principal *Sudder Amin*, of *Cawnpore*, against *Rawut Urjun Sing*, and *Doorjun Sing*, and *Rundheer Sing*, a minor, for recovery of the entire *ilaka* of *Rawutpore*, consisting of twenty-one villages enumerated in the plaint, in *pergunnahs Bithoor* and *Jagmow*, in the *Zillah* of *Cawnpore*. The plaint, after setting forth the facts above stated, alleged, that in the family of the *Rawut*, the hereditary estates and property were not subject to division, but vested entire in the eldest son, whether by birth or adoption, and after complaining of the act of the Deputy Collector in entering the Defendants' names jointly with his in the registry, as contrary to the rules of Government and the custom of the Plaintiff's family, he submitted the following statement:—"First. That estates held by families of *Rajas*, *Raos*, *Ranas*, and *Rawuts*, and the undivided ancestral inheritance of the Plaintiff, are not liable to

partition on the death of an incumbent, and that the custom of the exclusive succession of one individual to the *musnud*, as the chief or head of the family, cannot be disregarded or annulled. Second. That as Defendants' claim for the division of the estate in question had, in the original suit and appeal, been dismissed by the Judges of the Civil Courts without a final and conclusive order, how can the Deputy Collector, in the absence of a final order from any of the Courts, recognise that claim without hearing even the objections of the Plaintiff? Third. That if *Bussunt Rai*, the legitimate son of *Rawut Kurn Rai*, after the accession of *Khurg Rai* to the *musnud*, as above stated, were deprived of his paternal estate, how can Defendants, who are by a second wife, be considered, contrary to all former custom and prescription, entitled to a share by partition in the villages of the estate aforesaid, which has never been subjected to division? That what had been stated respecting *Bussunt Rai* can be proved by his descendants, who are present at *Rawutpore;*" and he prayed that the names of the Defendants might be excluded from the register of the Collector's office, and his own restored, agreeably to the custom of the family, to the sole possession of all the villages (except *mouza Kupli*) of *ilaka Rawutpore*, &c.

The Defendants *Urjun Sing* and *Doorjun Sing*, by their answer, denied that the eldest son had, according to the family usage, undivided possession of the estate in question, or that it was a rule in their family that the property and estates were never divided, or that the *musnud* was restricted to the person of the eldest son, contending, that the villages composing the estates were on a former occasion divided between

1851.

RAWUT URJUN SING v. RAWUT GHUNSIAM SING.

Khurg Rai and *Gunnesh Rai*, the sons of *Bikramajeet*, and that *Gunnesh Rai's* descendants now held the *mouza Kakades*, and, in conclusion, submitted that the Plaintiff was entitled by law to no more than one-fourth part of the estates in question.

The Defendant, *Rundheer Sing*, did not appear or put in an answer to the plaint.

The Plaintiff, in reply, insisted that the estates in question had been held by his ancestors as undivided hereditary property, and denied the fact of the alleged partition of the *Zemindary* by *Bikramajeet*, between *Khurg Rai* and *Gunnesh Rai*, his sons.

The Defendants in their rejoinder admitted that the disputed *talook* was an hereditary property, but asserted that the *Sastras* nowhere prohibited the division of estates of *Raos*, *Ranas*, or *Rawut*.

The Plaintiff entered into evidence, and filed a decree of the *Zillah* Court of *Cawnpore*, dated the 22nd of *May*, 1812, in a suit in which *Baz Sing* was Plaintiff, and *Rawut Girdhur Sing* Defendant, in which the custom of the family for an eldest son to succeed to the inheritance, to the exclusion of the younger sons, after taking the opinion of the Pundit of the Court, was recognised and declared. This decree contained the following declaration, "That as the Defendant has held possession of that and several other villages from the time of his ancestors, and has always borne the title of *Rawut* (as appears even from the depositions of Plaintiff's witnesses, and the *potta* granted to him, Defendant, by the former Collector of this *Zillah*), no doubt exists as to Defendant being the proprietor of *mouza Khajoory*, as well as of *chuk Oodey Kurn*." Also a decree of the Provincial Court of *Bareilly*, dated the 11th of *December*, 1819, affirming on appeal

the decision of the *Zillah* Court of *Cawnpore* in the above suit; a decree of the *Sudder Dewanny Adawlut* at *Allahabad*, bearing date the 20th of *September*, 1832, between *Gujraj Sing*, Appellant, and *Pirthi Pal Sing*, Respondent; and a decree of the Provincial Court of *Bareilly*, dated the 5th of *February*, 1833, in a suit in which *Lall Zalim* and *Lall Nurput Sing* were Plaintiffs, and *Raja Gunga Sing* and others Defendants, in both of which cases the Court had recognised and pronounced in favour of the validity of a family custom for one member to hold the entire estate to the exclusion of the other members of the family. He also examined three witnesses of great age, and well acquainted with the customs of his family. These witnesses deposed that, from a very early period, previously to the acquisition of the British Government of the territory in which the estate was situate, no partition had taken place of the estate, and that the rule of succession was, that at the death of the person last seised, the eldest son succeeded to the entire estate as the *Rawut* or *Raja*, while the younger sons had only a right to maintenance.

The principal *Sudder Amin* pronounced the decree of the *Zillah* Court on the 7th of *March*, 1839, in which he held that the Plaintiff had failed in establishing his claim, which was ordered to be dismissed, with costs.

The Plaintiff appealed from this decree to the *Sudder Dewanny Adawlut* of the North-West Provinces, at *Allahabad*, contending, in his grounds of appeal, that the decree was against the evidence in the cause, and contrary to the maxims of the *Sastra* and the custom of his family.

Mr. *B. Tayler*, the Judge of the *Sudder Dewanny*

1851.

RAWUT URJUN SING v. RAWUT GHUNSIAM SING.

Court, before whom the appeal came on to be heard, with a view of obtaining an exposition of the law upon the subject, submitted the two following queries for the *bewusta* of the Hindoo law-officers of the Court: "First. If there be certain villages in dispute belonging to a *Raj*, in which, according to the maxims of the *Sastra*, division is disallowed, and the incumbent of it furnish his heirs with a document stating, 'that after his death they may take their respective shares,' and then afterwards say that 'he had only executed that document with the view to intimidate the eldest son, and that it (the document in question) has not been attested by witnesses;' can such document be considered valid, according to the maxims of the *Sastra*? Second. Should those villages not belong to a *Raj*, (which cannot be divided,) but be held in a *Zemindary* or coparcenary tenure (which is subject to partition according to the maxims of the *Sastra*), and the proprietor of them should similarly furnish his heirs with a document containing a permission for them to divide the estate after his death, and then afterwards say that 'he had prepared the document in question merely to intimidate his eldest son, and that it has, therefore, not been attested by witnesses;' can that document be considered valid, according to the maxims of the *Sastra*?"

To these questions the Pundit returned the following answers:—1st. "When it is ascertained that a document is unattested, and has only been written for the purpose of intimidation, it cannot be considered valid according to the maxims of the *Sastra*. The words of *Nareda*, in *Viromitrodaya* (leaf 60, page 1, line 5) are to this effect: that a document executed by one who is night and day in a state of intoxication,

or by a female, or a child, or if a document has been procured by coercion, as for instance, by means of intimidation, &c., it cannot be considered valid. The words of *Vrihaspati*, in *Bhagwant Bhaskara* (leaf 9, page 1), are these, that a document attested by one witness only is incomplete; and *Menu* has stated, in the work entitled *Menu Smriti* (*adhyaya* 8, leaf 63, line 164), that any oral or written engagement which may be contrary to the custom of a family, is not to be considered valid; consequently, according to the authorities above quoted, a document not duly attested by witnesses, or one written in anger, or one which is opposed to the custom of a family, cannot be considered valid agreeably to the maxims of the *Sastra*."

2nd. "Villages appertaining to a *Zemindary* can be divided without the authority of any document; however, if a document be written in the manner mentioned in the question, it cannot be considered valid;" and he cited in support of this the authorities quoted in his answer to the first question, and proceeded, "therefore, if (according to the above authorities) a document bearing the attestation of one single witness is to be considered invalid, how much more will not the validity of that document be questioned which has not been attested at all?"

That Judge afterwards put the following further questions to the Pundit of the Court for his second opinion:—First. "If it be customary in any *Raj* for the eldest son to succeed after the death of his father, and this custom be an ancient one, can any incumbent, according to the maxims of the *Sastra*, divide the *Raj* in question among his sons, contrary to the said custom?"

Second. "If in a *Zemindary* estate, also, it be an

1851.

RAWUT URJUN SING v. RAWUT GHUNSIAM SING.

ancient custom for the eldest son alone to succeed to it after the death of his father, is an immediate possessor, under such circumstances, authorised by the *Sastra* to divide that estate among his sons, contrary to the said custom of his family?"

To these questions the Pundit returned the following answers:—First. "No division of a *Raj* can be made with propriety by any one, if the doing so should be contrary to an ancient custom, for the *Sastra* requires that the custom and usage of a family should be principally observed, and consequently the page and line of works containing the doctrines of *Rishi Eswara* (or holy legislators) which have been quoted in the answer to the following second question, are quite sufficient to show the reason why an estate of this description cannot be divided."

Second. "Agreeably to the doctrine of *Mitacshara Viromitrodaya* and *Menu Smriti*, &c., no proprietor (nor his heir) can infringe an ancient custom, and cause the division of an estate to be made, which, for several generations, has never been divided, in observance of an old standing custom of the family in whose possession it has been, for the *Sastra* admits the pre-eminence of the custom and usage of every family. In the work entitled *Menu Smriti* (*adhyaya* 4, *patra* 91, *sloka* 178), the words of *Menu* are these:—'That every one should observe the custom which his father and grandfather have observed, and that to act contrary to it would be improper.' The words of *Katyayana Rishi Eswara* are these:—'That one should observe the custom and usage of his family which may have existed for several generations;' and in the *patra* (leaf) and page of the *pothi* (or book), the words of *Vrihaspati* are to this effect:—'That what-

ever may be the standing custom of a country, caste, or family, it should be observed, and not infringed.' In *Pothi Karka, patra* 145, line 9, the words of *Yagnyawalkya* are as follows:—'Whatever may be the custom of a country and family, it should be observed.' In *Pothi Menu, adhyaya* 8, *patra* 152, p. 2, the words of *Menu Rishi Eswara* are these:—'That the ancient usages and customs established by ancestors and other virtuous persons, which have obtained in a country and caste, should be maintained, and not set aside;' consequently, no person or 'his' heir has the power, according to the above authorities and maxims of the *Sastra*, to divide an hereditary property, contrary to the usage and custom of his family, because it is necessary for every one to follow a custom which has been observed by his father and grandfather from generation to generation, and not to act contrary to the maxims of the *Sastra*."

Mr. *Tayler* recorded his opinion on the appeal on the 28th of *April*, 1841, as follows:—"That from the Pundit's *bewusta*, any property, the division of which may not be prohibited by the maxims of the *Sastra*, can, though a partition-deed may not be forthcoming, be divided into shares; and that when such a property happens to be a *Zemindary*, as in the case under consideration, nothing can hinder it from being divided agreeably to the maxims of the *Sastra;* consequently, the reasons given by the principal *Sudder Amin* in his decision in this case are correct and just;" but he ordered, "that the papers of this case be laid before another Judge, that final decree might be passed for dismissing the appeal and claim of the Appellant."

The proceedings were then laid before Mr. *F. Currie*, another Judge of the *Sudder* Court, who recorded his

1851.

RAWUT URJUN SING v. RAWUT GHUNSIAM SING.

opinion as follows:—"I am induced to differ, for the following reason, in opinion from Mr. *Tayler*, Judge of this Court. I consider it satisfactorily proved that from the time of the sons of *Bikramajeet* (who must have lived many hundred years ago, and from whose time no less than some eight generations must have passed) this estate has never been divided, and that every eldest son of a deceased incumbent has invariably succeeded his father by being elected the *Rawut* and sole possessor of the estate in question, and that when an incumbent has happened to be without a son, he has adopted a brother or a brother's son, and appointed him his successor, and the exclusive proprietor, of the said estate." He then proceeded:—"For several generations previous to the accession of the British Government in this country, as well as up to the present period, no custom of division has ever obtained, and the eldest son alone of every incumbent has succeeded to its sole possession; Plaintiff's claim, therefore, that the estate should be continued to him entire, on the ground of his being the eldest son, is consequently just and reasonable." And it was ordered, that the papers of the case be laid before the third Judge of that Court for final orders.

The appeal was next laid before Mr. *Thompson*, another of the Judges of the *Sudder* Court, who confirmed the view taken by Mr. *Currie*, and pronounced the final judgment of the Court on the 30th of *September*, 1841, the material part of which was as follows:—"In my opinion, also, the circumstance of the non-division of the estate in question for the last several centuries, and its having been held solely by the eldest son, as asserted by the Plaintiff, are fully proved by the papers of the case, and that no reason or argu-

ment has been advanced by the Defendants to disprove the above assertions of the Plaintiff, or to lead to a different conclusion. Consequently, as many other cases similar to the one under consideration have formerly been decided by the Court, agreeably to the usages and customs of families (and the records of which are adduced by way of precedents), the present case also requires that it be decreed likewise, agreeably to the usage and custom of the Appellant's family, by which he, the Appellant, is entitled beyond a doubt to the recovery of the entire estate in question." In concurrence, therefore, in opinion with Mr. *F. Currie*, it was ordered that the appeal and claim of the Appellant be decreed, and the decision of the principal *Sudder Amin* of *Cawnpore*, dated the 7th of *March*, 1839, be reversed, and that the costs of both Courts, with interest thereon, from the date of the decisions to the date of payment, be levied from the Respondents.

Against this decree the present appeal was brought.

The Appellants contended that the appeal was erroneous,—

First. Because the Appellants and the Respondent, and *Rundheer Sing*, were, according to the deed of partition of the 27th of *January*, 1826, and by the Hindoo law, entitled to the property in question in equal shares; and that the proof on the part of the Respondent, that, according to the custom of the family, he, as eldest son, exclusively succeeded to the property wholly failed. And

Secondly. Because the decree of the *Sudder* Court was contrary to Ben. Regs. XI. of 1793, and II. of 1803.

1851.

RAWUT URJUN SING v. RAWUT GHUNSIAM SING.

The Respondent submitted, that the decree appealed from was right, according to law, and the evidence in the cause,—

First. Because, according to the family custom, the *ilaka* of *Rawutpore* constituted an indivisible estate of inheritance, which descended entire to the eldest son, in exclusion of the other sons. And

Second. Because such family custom was in conformity with the Hindoo law.

Mr. *Stuart*, Q. C., Mr. *Forsyth*, and Mr. *Maule*, in support of the appeal, cited *Rajah Deedar Hossein* v. *Ranee Zuhoor-oon-Nissa* (*a*).

Mr. *Wigram*, Q. C., Mr. *Lloyd*, Q. C., and Mr. *Edmund F. Moore*, for the Respondent, were not called upon to address their Lordships.

Judgment was delivered, as follows, by

The Right Hon. T. PEMBERTON LEIGH:

We do not think it necessary to call upon the Respondent. The only question in the case is one of the family custom and usage. Upon the acts of the party and the nature of the property, the question is, whether this property descends entire, or is divisible. Now, upon that point it is said, that it is very possible the party may have property which is subject to division. It is very true, that the circumstances and nature of this property are only material, as forming one item on the question of probability, whether this is or is not divisible property, whether in our opinion it is a *Raj*, and, therefore, possessing whatever rights belong to property of that character.

By a decree, which was made in the year 1812, it

(*a*) 2 Moore's Ind. App. Cases, 441.

is stated distinctly, that "as the Defendant has held possession of the various villages from the time of his ancestors, and has always borne the title of '*Rawut*' (as appears even from the depositions of Plaintiff's witnesses and the *potta* granted to him, Defendant, by the former collector of this *Zillah*), no doubt exists as to the Defendant being the proprietor of *mouza Khajoory*, as well as of *chuk Oodey Kurn*."

Now, as to the nature of this property, it appears that the father of the present parties, unfortunately, was troubled with very disobedient sons, who quarrelled among themselves, and that he made different dispositions at different times; first, in favour of one, and then in favour of the other, and probably made declarations. But in 1827, he was examined before the acting Magistrate of the *Foujdarry* Court of *Cawnpore*, and being called upon to state the nature of the dispute existing between himself and his sons, he stated, as to this property, as follows:—"The fact is, I am personally concerned in no dispute, for as long as I am living, I am the proprietor of my estate. But the custom in my family has been this, through every generation, since the estate has come into existence, that the eldest son succeeds to the *musnud*, and the estate is held by him entire and undivided, and that the subsistence of the other sons is provided for."

In 1827, it appears that the Magistrate thought it necessary to inquire into the custom, with respect to the division of estates of *Rajas*, and got certificates from four *Rajas*, as to that custom, and the statement made in answer by *Raja Dan Sing* was, "that in the families of all such *Rajas* as received the *kashka* (or mark of red ochre on the forehead), and sit on *guddies*, the estate is not divided into shares, but that it is customary for the eldest son to succeed his father in the

1851.

RAWUT URJUN SING v. RAWUT GHUNSIAM SING.

guddy; after that they continue subject to his authority, and that such has been the custom in his family from ancient times." Statements to the same effect were sent by the other three *Rajas*.

In addition to this, we have the pedigree of this particular family taking it up from the time of *Rawut Kheem Kurn*. It appears there had been, I think, eight descents, and in three or four at least of these, there having been more than one son, the property had not been divided between those sons; one very remarkable case is this, that *Rawut Kurn Rai* having adopted a son, that son proceeded to deal with the property as an undivided estate, and excluded an after-born natural son of *Rawut Kurn Rai*. There are other cases in which, had there been the liability to division, that division might have taken place.

Then it is said, that it appears at the time of *Bikramajeet*, there was a division of a portion of this *Raj*, and that it was divided between two sons of *Bikramajeet*, *Khurg Rai*, who was adopted by *Kurn Rai*, and *Gunnesh Rai*, who was the next son of *Bikramajeet*. Now, with respect to that, it is necessary to make out that the property, which was then the subject of division, was the *Raj* of *Rawutpore*. I cannot find that there is any evidence at all to that effect; all presumption is to the contrary, because *Khurg Rai* would have been in possession, at all events, of half that *Raj*, and the property stated is not the *Raj* of *Rawutpore*, but the *Zemindary* of *Bikramajeet*. Now that portion of the *Zemindary* has remained, it appears, exempted; if it had been part of *Rawutpore*, it would have been subject to the same state of things.

Under these circumstances, therefore, the judgment will be affirmed, and of course in the usual way, with costs.

TABLE

OF

CASES REPORTED.

VOL. V.—PART II.

Page

Douglas *v.* The Collector of Benares—*Equitable mortgage. Decree against mortgagor. Government sale of defaulter's lands. Suppression of notice to auction purchaser of lien. Conversion. Accounts. Title of auction purchaser under Government sale. Practice. Pleading. Regulations IV. of* 1793, *sec.* 8, *and XXVI. of* 1814, *sec.* 10 271

East India Company *v.* Nuthumbadoo Veerasawmy Moodelly—*Mirasy rights. Compensation by Government for seizure of. Bill for specific performance of agreement. Evidence* 217

Lutchmeputty Naidoo, In Re—*Practice. Petition coming on for hearing ex parte. Notice to Government. Peremptory Order to Sudder Court Judges to carry into execution decree of Privy Council* 300

Muttyloll Seal *v.* Dent—*Bills of Exchange remitted for specific purpose. Appropriation. Fraud by agents. Sale. Assumpsit by remitters for proceeds against a purchaser who had a knowledge of the fraud Indebitatus count* . 328

Page

Musadee Mahomed Cazum Sherazee, In Re—*Practice. Bombay Charter. Leave to appeal granted upon terms of not disturbing what the Court below might have done* . . 196

Musadee Mahomed Cazum Sherazee *v.* Meerza Ally Mahomed Shoostry—*Res judicata. Demurrer to Bill* . 187

Nawab Amin-ood-Dowlah *v.* Syud Roshun Ali Khan—*Mahomedan Law. Shias sect. Nuncupative Will. Bequest by Mahomedan when valid, if beyond one-third of his estate* 199

Rajah Bommaranjee Bahadoor, In Re—*Practice. Petition to stay execution of decree of Sudder Court pending appeal* 298

Ruckmaboye, Her Highness, *v.* Lulloobhoy Mottichund—*Statute*, 21 *Jac. I., c.* 16. *Extension to India. Limitation. Procedure. Hindoo contract. Lex fori. Construction of words "beyond the seas." "Out of the territories of the East India Company." Constructive inhabitancy by carrying on business at Bombay. Bombay Charter of 8th December*, 1823. *Supreme Court, procedure of. Pleading. What sufficient averment of parties being Hindoos* . . 234

Sibnarain Ghose, In Re—*Practice. Leave to appeal. Appealable value. Security. Recognizance* . . 322

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

MUSADEE MAHOMED CAZUM SHERAZEE - - - - - } *Appellant*,

AND

MEERZA ALLY MAHOMED SHOOSTRY, and BEBEE MARIAM BEGUM - } *Respondents.**

On appeal from the Supreme Court at Bombay.

14th May, 1851.

A general demurrer, on the ground of the subject-matter of the suit being *res judicata*, allowed to a suit brought in the Supreme Court of *Bombay*, by a party claiming certain property, which appeared by the statements in the Bill to have been the subject of a previous suit in the same Court, in which the Plaintiff had intervened by petition, and obtained some order, the nature or effect of which was not stated, and did not appear upon the Record then before the Court.

THIS was an appeal from an order in the Supreme Court at *Bombay*, allowing a general demurrer by the Respondents to a bill filed by the Appellant against the Respondents.

The Bill stated, that *Aga Mahomed Rahim Sherazee*, of *Bombay*, merchant, being largely indebted to the Appellant upon an account stated and settled, and for other advances, amounting together to the sum of Rs. 324,500, by an indenture, dated the 30th of *December*, 1845, and made between *Aga Mahomed Rahim Sherazee* of the one part, and the Appellant

* Present: Members of the *Judicial Committee*,—The Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

1851.

MUSADEE MAHOMED CAZUM SHERAZEE v. MEHRZA ALLY MAHOMED SHOOSTRY.

of the other part, absolutely granted, bargained, sold, aliened and released to the Appellant, his heirs, executors, administrators and assigns, one undivided moiety or equal half part of and in all that piece or parcel of land or ground upon which *Aga Mahomed Rahim Sherazee* had formed a dock for the building and repairing of ships, called the "*Mazagone* Dock," in the island of *Bombay*, together with one undivided moiety in the houses, buildings and appurtenances to the same premises belonging or appertaining: to have and to hold the dock, hereditaments and premises unto and to the use of the Appellant, his heirs, executors, administrators and assigns. That the Appellant thereupon entered into possession of the dock and premises, and became jointly interested therein with *Aga Mahomed Rahim Sherazee*. The Bill further stated, that shortly after the conveyance to the Appellant, *Aga Mahomed Rahim Sherazee* conveyed unto *Hajee Goolam Hoossein Sherazee*, his heirs, executors, administrators and assigns, the remaining moiety of the dock, hereditaments and premises. The Bill further stated, that the Appellant and *Hajee Goolam Hoossein Sherazee*, being so jointly entitled to the dock, hereditaments and premises at *Mazagone*, entered into an agreement in writing with the Peninsular and Oriental Steam Navigation Company, for a lease to the Company of the dock and premises; whereby it was stipulated and agreed, that the docks and premises should be completed by the Appellant and *Hajee Goolam Hoossein Sherazee*, or at their or one of their personal expense; and the channel leading to the docks cleared, and the docks kept in repair by them, or one of them, in like manner; and that it was stipulated by such agree-

ment, that if the proprietors of the dock and premises failed to keep the same in repair, any amount of money disbursed by the Company for that purpose or otherwise, should be deducted from the rent to be paid for the dock and premises. That the Company entered into possession of the dock and premises, and that large sums of money had been expended by the Appellant in the completion, perfecting and repairing the same. That the sums so laid out and expended by the Appellant amounted to Rs. 25,800 and upwards; and that no part thereof was defrayed by *Hajee Goolam Hoosscin Sherazee*, who died in *July*, 1847. That by a decree, dated the 25th of *November*, 1846, made in a certain cause on the Equity side of the Supreme Court of *Bombay*, wherein the Respondents, as residuary legatees of one *Mahomed Ally Khan*, were Complainants, and *Aga Mahomed Rahim Sherazee*, as the personal representative of *Aga Mahomed Shoostry*, who was the executor of the last Will of *Mahomed Ally Khan*, was Defendant; it was ordered and decreed, among other things, that *Aga Mahomed Rahim Sherazee* should pay into the Supreme Court the sum of Rs. 11,74,459 and 65 reas. That at or previous to the time of the conveyance of the moiety of the dock and premises to the Appellant as aforesaid, the Appellant had no knowledge or information whatever of or concerning the proceedings or any of them in the last-mentioned suit, or of the fact that any other suit, action or cause or proceeding whatever was pending, in any way affecting or relating, or which could affect or relate, to the dock, hereditaments and premises, or other the property, lands and goods theretofore of *Aga Mahomed Rahim Sherazee*. That the Sheriff of *Bombay*, on the 18th of *March*, 1847,

1851.

MUSADEE MAHOMED CAZUM SHERAZEE v. MEHEZA ALLY MAHOMED SHOOSTRY.

acting under certain writs of sequestration to him directed and issued out of the Supreme Court in the cause above-mentioned, entered upon, seised and sequestered the dock or docks, hereditaments and premises, and thenceforward held, and still at the date of the filing of the Bill of Complaint continued to hold, the dock, hereditaments and premises in sequestration. The Bill then stated, that shortly after such sequestration, and on the 8th of *April*, 1847, the Appellant presented his petition (*a*) to the Supreme Court for the purpose of supporting and making out his right, title, claim and interest in and to the docks, hereditaments and premises in opposition to the claim made by the Sequestrator. That divers proceedings were taken, relative to the claim of the Appellant to the dock, hereditaments and premises, before the Supreme Court; but that the Appellant failed to make out to the satisfaction of the Court, that the consideration money for such moiety or undivided part of the dock and premises had been paid, and that the claim of the Appellant was, therefore, not allowed. That no proceedings whatever had been taken by any party claiming title or interest in respect of the moiety of the Appellant in the dock and premises, for the purpose of invalidating the conveyance to him, the Appellant, of such moiety, or by establishing a title in opposition

(*a*) It appears from a report of this case, *nom.* "Mushedy Kazim's claim," Perry's "Oriental Cases," p. 35, that the mode in which the Plaintiff intervened in that suit was by filing a petition and applying by affidavit to be allowed to go before the Master and to examine witnesses, *pro interesse suo*, when the Court, with the consent of the parties, examined the witnesses *viva voce*, and directed issues to try the right in question, and that after a trial, which lasted several days, the Court, on the 14th of *November*, 1848, decided against the validity of the Plaintiff's claim.

to that of the Appellant, or in priority over his title. And that no decree or order of the Supreme Court had ever been made, declaring the validity of the Appellant's title, or for the delivering up of the conveyance and other evidences of title to any other person. That the Peninsular and Oriental Navigation Company had paid into the Supreme Court the sum of Rs. 28,219, as and by way of rent for the dock-yard, and that such sum had since been paid into the hands of the Sequestrator. And the Bill further stated, that the Appellant was entitled to have the moiety of the dock and premises delivered over to him out of the hands of the Sequestrator, and to have it declared that the same was freed and discharged from all claim and interest of the Respondents or either of them, and to hold the same freed and discharged accordingly. And the Bill prayed, that the Appellant might be declared entitled to a moiety of the docks, &c.; and that the rents thereof, which had come into the hands of the Sequestrator, might be delivered up to him, and that in case he should be unable to make out a good and sufficient title to the whole of the moiety, he might be declared to have a good claim and charge on such moiety for such monies as he should be found to have paid therefor and expended thereon, and to have a lien on the sum of Rs. 28,219 paid into Court, and for general relief.

To this Bill the Defendants filed a general demurrer for want of equity.

The demurrer came on for argument before the Supreme Court, on the 14th of *May*, 1849, when the Court took time to consider the judgment.

On the 17th of *May*, 1849, the Chief Justice (Sir *Erskine Perry*) delivered the judgment of the Court,

1851.

MUSADEE MAHOMED CAZUM SHERAZEE v. MEERZA ALLY MAHOMED SHOOSTRY.

that the proceeding by the Bill was an attempt to re-agitate a claim which had been previously disposed of by the Court, and was, therefore, *res judicata*, and ordered the demurrer to be allowed with costs.

From this order the present appeal was brought.

Mr. *Lloyd*, Q. C., and Mr. *Fulton*, for the Appellant.

This demurrer was improperly allowed. The proceedings of the Court on the Appellant's petition, and the order dismissing the same, did not constitute a bar to the Appellant filing a Bill in respect of the matters therein complained of, as it is not stated in the Bill that the whole claim for relief prayed for had been previously disallowed by a Court of competent jurisdiction. The Defendants are bound to show that the subject-matter of this Bill was the same as was adjudicated in the former suit, and that the right came in question before a Court of competent jurisdiction, and that the result was conclusive so as to bind the judgment of every other Court. *Behrens* v. *Sieveking* (*a*). That case, it is true, was upon a plea, but there is no difference in this respect between a plea and a demurrer. How is it shown that the matters alleged in the Bill are the same as in the petition? And how can it be said that it was *res judicata*, when the order made by the Court does not appear?—[Mr. *Pemberton Leigh:* Is not the fact of the former suit having been before the same Court, and part of the Records of the Court, important? Might not the Court look to those proceedings?]—Those proceedings were not before the Court

(*a*) 2 Myl. & Cr. 602.

when the demurrer was argued, and the Court could not incorporate them with the Bill.—[Mr. *Pemberton Leigh:* As the Bill is framed, the Appellant claims, first, an absolute right by purchase to one moiety, and then he claims a lien on the whole property for sums expended by him upon the premises. Now, if such a case as this was in the Courts here, would he not proceed by petition, as the Plaintiff did, and would not the Court refer the matter to the Master, upon whose report liberty would be given him to proceed at law by ejectment? Or if the matter was too complicated for adjudication upon the record, then the Court would give him leave to file a Bill for the purpose of raising the question necessary to the investigation of his title. Now, as such a course, which would be obvious and proper, has not been pursued, would it not be assumed that the Court was satisfied upon the facts disclosed in the petition, and the evidence brought forward by the Appellant, that his claim was untenable? and, as he has neither excepted or appealed from that decision, could he bring a fresh bill for the same matter, without such bill being demurred to?]—He might have brought an equitable ejectment. *Ansdell* v. *Ansdell* (*a*), *Ricardo* v. *Garcias* (*b*), *Pickford* v. *Hunter* (*c*), *Hyde* v. *Edwards* (*d*), Vin. Abr., tit. "Decree," were referred to.—[Sir *John Jervis:* Is not the case, *Robson* v. *The Attorney-General* (*e*), in point?]—The present Bill was a proper proceeding, and in conformity with the practice of the Supreme Court; and upon the facts stated therein, the Appellant was entitled to the relief prayed.

(*a*) 4 Myl. & Cr. 449.
(*b*) 12 Clk. & Fin. 368.
(*c*) 5 Sim. 122.
(*d*) 12 Beav. 160.
(*e*) 10 Clk. & Fin. 471.

1851.

MUSADEE MAHOMED OAZUM SHERAZEE v. MEERZA ALLY MAHOMED SHOOSTRY.

Mr. *Turner*, Q. C., and Mr. *Leith*, for the Respondents, were not called upon.

The Right Hon. T. PEMBERTON LEIGH:

This case has been argued with very great ingenuity, and many points brought forward; but the whole question which we have to determine, is, whether upon this Bill, it appears that the Plaintiff ought to be permitted to prosecute this suit; whether he has grounds upon the state of things presented on the record, for saying the suit ought to proceed.

Now the facts appear to be these:—In the year 1845, the present Appellant represents that he purchased a moiety of the property, which is the subject of the present suit, from a person named *Sherazee;* that a conveyance was made of that moiety in consideration of a sum of money partly then owing, and partly paid as a further consideration for the purchase; that he entered into the possession of that moiety jointly with the proprietors of the other moiety, and that they together agreed to let it to the Steam Navigation Company at a rent, a part of the agreement being, that the lessors should keep the property in repair, and that if it was not sufficiently kept in repair, then the lessees should be at liberty to deduct the expenses of repair out of the rent; that in 1847, large sums had been expended by the Appellant on account of these repairs under this agreement, and that no part of those sums was contributed by the other tenant in common. He then states, that a decree was made, on the 25th of *November*, 1846, against *Sherazee*, for the payment of a large sum of money in a suit which had been instituted, and that under proceedings in that suit the Sequestrator took

possession of the estate as being the property of *Sherazee*. In this state of things, I apprehend, according to the state of this record, the Plaintiff's course was perfectly plain, and there was only one course that he could take, as I understand the practice here. He had a legal title to one moiety of this estate, the whole of which had been seized by the Court as belonging to another person. The Appellant's Counsel said he might have proceeded, if he had chosen to incur the consequences of contempt, without any application to the Court, by a proceeding in a Court of law. He did not adopt that course, which if he had would certainly not have been a very wise one. But he presented a petition which he states in the Bill was "for the purpose of supporting and making out his right, title, claim, and interest in and to the dock, hereditaments and premises, in opposition to the claim made by the Sequestrator." Now according to the case which he had made, the course to be taken was perfectly clear; if he had a legal title, he was to be at liberty to assert that title to the property which was in dispute; that is to say, the lien which he had upon the rents and profits. I apprehend that the usual course would be by an inquiry before the Master, or if it could not be so done, then it would be the subject of a suit, which the Court would give him liberty to institute, for the purpose of ascertaining and determining those rights. Now what the order was that was made upon that petition does not appear, and the Appellant has strongly pressed upon the Court that fact, by saying, how can it be said that the matter is *res judicata*, when from all that appears in these proceedings there was no decision at all? But does the Appellant state anything

1851.

MUSADEE MAHOMED CAZUM SHERAZEE v. MEERZA ALLY MAHOMED SHOOSTRY.

in his Bill that shows, supposing such Bill to be pending, that he is at liberty either by any order of the Court, or from any inherent equity in himself, to institute this suit? If he has not told us what order was made, he must take the consequences: we must assume that it was an order which either entirely disallowed the claim, or allowed him to take some proceeding which he has not thought fit to adopt. In that state of things, how is it possible to say that this Bill is one that ought to have been maintained? It is said by the Court below that he is concluded, that that order, if erroneous, cannot now be appealed against. It may be necessary, if he has any ground of complaint against that order, to make some special application for the purpose of impeaching it; but whether such application would succeed or not, is not the question now before us: the only question that we can determine is, whether the present proceeding taken by the Appellant was a fit and proper proceeding, and one which the Court ought to have maintained. We think it is not; and, therefore, the order allowing the demurrer in the Court below must be affirmed, and with costs.

IN RE MUSADEE MAHOMED CAZUM SHERAZEE.*

24th April, 1852.

IN RE MUSADEE MAHOMED CAZUM SHERAZEE.

In consequence of the intimation contained in the above judgment, *Musadee Mahomed Cazum Sherazee*

* Present: Members of the *Judicial Committee*,—Lord Cranworth, the Right Hon. Sir James Knight Bruce (Lord Justice), the Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

Leave given to appeal, under circumstances, though the time limited by the *Bombay* Charter had expired, and the decree of the Court below sanctioning the sale of real estate, the subject of the suit, had been partially acted on; the petitioner under-

1852.

IN RE MUSADEE MAHOMED CAZUM SHERAZEE.

presented a petition, praying for leave to appeal from the Order of the Supreme Court, dated the 14th of *November*, 1848, made in the suit mentioned in the Bill.

The petition now came on for hearing.

Mr. *Lloyd*, Q. C., and Mr. *Forsyth*, in support of the petition,

Submitted, that it was a case for the indulgence of the Court; that, although the time limited by the *Bombay* Charter for appealing had expired, yet that the delay arose from the petitioner having been advised to file a Bill instead of appealing against the Order of the Supreme Court.

Mr. *Leith*, *contrà*,

Urged, that it was not such a case as justified the exercise of the discretionary power vested in the Court, as the Sequestrators had proceeded to sale, and had already sold portions of the estate, the subject of the suit, in which the petitioner had been admitted to intervene, and had been allowed to examine witnesses, *pro interesse suo*, which portions were then in the possession of the purchasers, whose title would be affected by the admission of the appeal. He insisted, moreover, that an appeal would not lie from the Order dismissing the petition, as the sole question that could be raised upon appeal was the credibility of the witnesses, which the Court below had discredited. *Santacana* v. *Ardevol* (*a*). *In re Sherwin* (*b*).

(*a*) 1 Knapp's P. C. Cases, 269. (*b*) 4 Moore's P. C. Cases, 311.

taking not to disturb the possession or title of the purchasers of any part of the property actually sold; to give security for costs, and to abide by any order which the Judicial Committee might think fit to make, touching the matters in dispute.

1852.

IN RE MUSADEE MAHOMED CAZUM SHERAZEE.

Lord CRANWORTH:

Their Lordships have considered what course they ought to take in this case, which is one of some embarrassment, because the parties in *Bombay*, after the adjudication upon the reference, *pro interesse suo*, took a proceeding which has been determined, first, by a Court of competent jurisdiction at *Bombay*, and afterwards by this Committee, to have been erroneous; and having failed in that proceeding, the consequence has been, as we are told, that the property in question has been sold, and persons have acquired title under that sale, which they had a right to consider an effectual and valid title against all the world.

Now we are inclined to think that it may be reasonably said that the course which was taken by the parties, though erroneous, may have been taken *bonâ fide*, under the belief that it was the proper course. I cannot say I am myself perfectly satisfied that it was so; I should like, on that subject, to have had an affidavit explaining why it was, and showing it was altogether a mistake from the beginning. The difficulty we have had has arisen from this, that purchasers, third persons, innocent persons, have acquired a title, or certainly may have acquired a title, which may be affected by permitting the party now to appeal. At the same time, we think, we see a course which may give the petitioner what he wants, and protect any purchaser. The order we shall make is this, and if the petitioner do not assent to it, his petition will be dismissed. "The petitioner consenting and undertaking that he will, under no circumstances, disturb, or attempt to disturb, the possession or title of the purchasers of any part of the property sequestered, and since sold, let him be at liberty, within six

1852.

IN RE MUSADEN MAHOMED CAZUM SHERAZEE.

calendar months, to appeal against the order of the 14th of *November*, 1848; giving security for costs to the amount of £1500; this undertaking of the petitioner not to prejudice any right he may have against the purchase money of the said premises, or any part thereof; and also consenting and undertaking to abide by any order which the Judicial Committee may think fit to make, touching the matter in dispute, and the costs of the proceeding."

NAWAB AMIN-OOD-DOWLAH and others - - - - - } *Appellants,*

AND

SYUD ROSHUN ALI KHAN and FATIMA BEGUM - - - - } *Respondents.**

On appeal from the Sudder Dewanny Court at Allahabad, Bengal.

21st June, 1851.

A nuncupative Will by a Mahomedan of the *Shias* sect, bequeathing property, less in amount than one-third of his estate, held valid by the Mahomedan law, and effect given to the bequests.

Semble.—Such verbal bequests would have been valid, even if beyond a third of the testator's estate, provided the heirs concurred in the bequests.

IN this case, the only question between the parties was the validity of a nuncupative Will of the late *Nawab Moatumud-ood-Dowlah*, declared by him on the 2nd of *May*, 1832, whereby he gave and bequeathed,

* Present: Members of the *Judicial Committee*,—The Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

1851.

NAWAB AMIN-OOD-DOWLAH v SYUD ROSHUN ALI KHAN.

among other bequests, a monthly allowance of Rs. 300 to each of the Respondents, *Syud Roshun Ali Khan* and *Syud Shah Newaz Khan*, since deceased, and now represented by the Respondent, *Fatima Begum*.

The parties were Mahomedans of the *Shias* sect. The bequests made by the Testator in favour of the Respondents and others, amounted to less than one-third of his estate. The Appellant, *Nawab Amin-ood-Dowlah*, was the son, and the Respondents relations and dependants, of the Testator.

The deceased formerly held the office of prime minister to the King of *Oude*. He left the service of the King of *Oude*, and settled in *Cawnpore*, in the presidency of *Bengal*, whither he was accompanied by the Respondents and other members of his family. By an agreement entered into between the King of *Oude* and the British Government, on the 17th of *August*, 1825, the sum of Rs. 20,000 per mensem was secured in perpetuity to the deceased as a pension for the maintenance of himself and family. This agreement, so far as it related to the above pension, was in these terms: "This allowance is to be paid in perpetuity to the *Nawab* and his heirs. It will be paid in perpetuity after his demise, agreeably to his Will, to his sons, daughters, and wives, and other dependants. If it happens that he makes no Will, in that case the allowance is to be given to his lawful heirs, according to the laws of inheritance, in conformity to the tenets of the *Shias*." The *Nawab* allowed to the Respondents out of the above grant the sum of Rs. 300 monthly, each; to his sister (the Respondent) *Fatima Begum*, the monthly allowance of Rs. 300; and to his other

sister, *Noor-oon-Nissa Begum*, the monthly sum of Rs. 200, and these allowances were continued to be paid by him up to the time of his decease.

Previous to his death, the *Nawab* declared his Will in the presence of several persons; and he appointed the Appellant his executor, and directed that the above allowance of Rs. 300 to each of the Respondents, and the allowance of Rs. 300 and Rs. 200 to each of his sisters, should be continued to be paid to them from the pension secured to him by the agreement of the British Government.

Shortly after the death of the *Nawab*, *Shah Newaz Khan* and *Roshun Ali Khan* applied to the Appellant for payment of their allowances, to which application he replied by letter, dated the 25th of *September*, 1832, as follows: "Your esteemed letter requesting payment of your allowances, in accordance with the Will of my revered father, *Nawab Moatumud-ood-Dowlah*, peace be to him! and to confirm the legacies of the deceased to others, has come to hand, and has informed me of your wishes. As regards myself, I have no objection to pay your allowances; because the deceased, in respect of this matter, emphatically declared his Will, viz.: That if you should be grieved on account of your allowances, or for want of respect to your station, his soul would have no rest or peace in the grave. It is true that he appointed me his executor as regarded you, and declared his Will; but as the payment of your allowances is contingent on effect being given to the Will, and on my being acknowledged his representative; and as the operation of the Will declared by the deceased *Nawab* is held in abey-

1851.

NAWAB AMIN-OOD-DOWLAH v. SYUD ROSHUN ALI KHAN.

ance in consequence of the machinations of evil disposed persons, and I have claimed to be the executor of the Will, and as yet there is delay in the completion of the arrangements, I put it to you as a point of justice, to say whence I am to obtain the means of paying your allowances. If Major *Low* assents to pay your allowances from the Government acknowledgment, agreeably to the said Will, to my seal, since I am the executor of the deceased *Nawab*, and if he gives me the control in every respect of the family, I will always continue to discharge your claims and the claims of other claimants without demur"

The Appellants afterwards refused to pay these stipends, and on the 12th of *March*, 1835, the Respondents and *Syud Shah Newaz Khan* filed their plaint in the *Zilla* Court of *Cawnpore*, against *Nawab Nizam-ood-Dowlah*, *Nawab Amin-ood-Dowlah*, the sons, *Khas Mehal* and *Khoord Mehal*, the widows of the deceased *Nawab*, and the guardians of *Bakir Ali Khan* and *Mahomed Ali Khan*, the sons, *Fatima Begum* and *Nunhi Begum*, the infant daughters of the deceased *Nawab*, in the first instance, to recover the sum of Rs. 7200, the amount of one year's allowances.

The Defendants, *Nawab Amin-ood-Dowlah* and *Nizam-ood-Dowlah*, and others, put in their joint answer to the plaint on the 29th of *April*, in the same year, in which they insisted, that the suit of the Plaintiffs was illegal, that the omission of three years' allowances and a suit for the allowance of only one year, instead of suing for the whole, amounted to an infraction of the stamp laws, and, without denying the justice of the Plaintiffs' demands, called upon them

for proofs of the testamentary declaration of the deceased *Nawab*.

In consequence of this objection, the original Plaintiffs, on the 30th of *May*, 1835, commenced a fresh suit against the Defendants, for recovery of the sum of Rs. 14,400, the allowances for two years, commencing from *May*, 1833, and ending with *April*, 1835. To this suit the Defendants urged the like objections by way of defence, as they had pleaded to the original plaint.

The Plaintiffs entered into evidence to establish their case. They filed the letter dated the 25th of *September*, 1832, from the Defendant, *Nawab Amin-ood-Dowlah*, to the Plaintiffs; an agreement between *Nawab Begum* and other members of the family to pay the Plaintiffs their allowances according to the testamentary declaration of the deceased *Nawab*; various letters from *Khas Mehal*, and *Khoord Mehal*, admitting the Will; and a *futwa* of the Mahomedan lawyers establishing the validity a verbal testamentary declaration. They also examined seven witnesses, who proved, that the deceased *Nawab*, being in his perfect senses, made a testamentary declaration in favour of the Plaintiffs. Three of these witnesses were attendants, who waited upon the deceased *Nawab* in his illness, and were present at the time of the *Nawab* declaring his Will, and their testimony was corroborated by other witnesses, also attendants on the deceased.

The Defendants did not enter into any counter-evidence to rebut the Plaintiffs' case, although allowed twelve months for that purpose.

The decree of the *Zilla* Court of *Cawnpore* was pronounced on the 30th of *August*, 1836: the

1851.

NAWAB AMIN-OUD-DOWLAH v. SYUD ROSHUN ALI KHAN.

decree, after stating at length the nature of the pleadings and evidence in the cause, proceeded in these terms: "The issues in this case are two:—First, is a verbal Will good and valid, under the Mahomedan law, or not? Secondly, did the late *Nawab*, in his last sickness, verily declare his Will in favour of the Plaintiffs to the effect pleaded by them, or not? As regards the first question, it is evident from the opinions of the learned of *Lucknow*, which bear their seals, among whom is *Moulavie Syud Mahomed*, the *Moojtahid* of the *Shia* sect, that a verbal Will is valid, and will be of effect to the extent of one-third of the estate of the deceased, without the consent of the heirs, and even beyond a third if the heirs consent thereto." And upon the second point, the decree proceeded as follows:—"The fact, therefore, that the late *Nawab* declared it to be his Will that the monthly allowances assigned to them, corresponding in amount with the sum claimed by the Plaintiffs, should be paid to Plaintiffs in perpetuity from the Government obligation, is fully established and proved by documents and oral testimony, and, agreeably to the Mahomedan law, Plaintiffs are entitled to monthly allowances from the money mentioned in the Government obligation. Defendants objected to an action being brought for the allowances of one year, and that two years had been omitted; as Plaintiffs, however, have instituted an action for the allowances of the remaining two years, this objection is removed. Although the *Vakeels* of Defendants were directed, by a proceeding, dated 19th of *June*, 1835, to file such evidence as they might have to disprove the claim, and a week was allowed for that purpose, no evidence to disprove the claim of Plaintiffs has been put in on the part of the

Defendants, although a whole year has expired since that order was passed; but at this present moment a petition, accompanied by a list of eight women, to prove that none of the female witnesses on the part of Plaintiffs were present during the sickness of the late *Nawab*, has been filed; but as the object is to prove a negative, it is rejected. The claim of Plaintiffs being proved, Plaintiffs are entitled to receive the amount of their claim from the Defendants who have received the payments under the Government obligation." And it was ordered, that a decree should pass in favour of Plaintiffs against all the Defendants for the amount of claim, with costs.

The Defendants appealed from this decree to the *Sudder Dewanny Adawlut* at *Allahabad*. The proceedings came before Mr. *Walter Ewer*, one of the Judges of that Court, who, on the 3rd of *December*, 1836, recorded his opinion, as follows:—"I am of opinion, that the decision of the lower Court is very imperfect and incomplete. The validity of a verbal Will, based on the authority of the *futwa* relied on by the Judge, which was filed by the Respondents themselves, might have been admitted, had the Judge, after having completed the record, sent the papers of the case to the *Mufti* of the *Zilla* Court, agreeably to established practice of Court, and in conformity to the provisions of sec. 17, Reg. III., 1803, in order that the *Mufti*, taking into consideration the evidence on both sides, might first determine whether the Will had been declared, or not; and then, keeping before his eyes the commands of the Mahomedan law, have declared whether it was valid, or otherwise. Again, as regards the letters written by Defendants, which

1851.

NAWAB AMIN-OOD-DOWLAH v. SYUD ROSHUN ALI KHAN.

Plaintiffs adduce as evidence, and the testimony of Plaintiffs' witnesses, I am of opinion that, until the counter-evidence on the part of the Defendants is fully and completely taken, they ought not to be received as proofs. On the above grounds, I am of opinion, that the evidence on which the lower Court relies as proof of the Will is insufficient. In his decree, the Judge states that Defendants failed for a whole year to file their counter-evidence, although the term of one week had been granted them. Although the evidence on the part of the Plaintiffs had been completed, and although there was delay on the part of the Defendants in filing their counter-evidence, nevertheless, I am of opinion that, considering the great importance of the case, and the fact that no Will had been made in writing by the Testator, in behalf of the legatees, the Judge ought, in observance of the rules laid down in Reg. XXVI., 1814, to have admitted further inquiry and investigation, and received the counter-evidence on the part of Defendants. This course not having been observed, I consider the decision of the *Zilla* Court to be extremely incomplete and imperfect." And the Court ordered, "That the decision of the Judge of *Zilla Cawnpore*, dated 30th of *August* of that year, should be reversed; and that a copy of that proceeding, together with a copy of the Appellants' petition, should be sent, under cover of a precept without limit of term, to the Judge of *Zilla Cawnpore*, directing that officer to place the case on its original number on his file; and, taking into consideration the objection, that Plaintiffs had brought separate suits for one and the same object on an identical claim, and after taking the counter-evidence of the

Defendants, calling for a *futwa* from the *Mufti* of the Court, and observing the directions above given, to dispose of the case in the regular mode."

In pursuance of this order, the suit was restored to its original number on the file of the *Zilla* Court for re-trial before the *Sudder Amin*, with directions for him to take the depositions on oath of the witnesses mentioned in the list filed by the Defendants.

The Defendants examined seventeen witnesses, who were servants in their employ. These witnesses were produced to contradict the Plaintiffs' witnesses in support of the Will. The effect of their depositions was, that they did not hear the Will declared as alleged, and that the deceased was speechless at the time. The Plaintiffs also examined further witnesses, consisting of the physician, and personal servants of the deceased *Nawab;* whose testimony was conclusive as to the soundness of his state of mind, and confirmed the previous evidence, as to the declaration of the Will in question.

On the 31st of *December*, 1838, the *Zilla* Court pronounced its decree in the cause, the material part of which was as follows:—"Without reference to the insufficiency of the grounds contained in the former decision and the evidence adduced by the Plaintiffs in proof of a verbal Will, there being no writing, it is the opinion of the *Sudder* Court, that the institution of one suit for part of a matter, and a subsequent suit for the remaining part, viz of the allowances, brought on the objection of Defendants, is irregular with reference to the practice of the Courts and the provisions of the law, and, therefore, open to nonsuit." And it was ordered, "That the claim of Plaintiffs be nonsuited, and that the Plaintiffs pay the costs of

1851.

NAWAB AMIN-OOD-DOWLAH v. SYUD ROSHUN ALI KHAN.

this and the *Sudder* Court, and Plaintiffs are competent to bring suit, *de novo*, for their entire claim."

In the second original suit, instituted, as before stated, for the recovery of two years' allowances, proceedings to the same effect took place as in the original suit for the one year's allowance, and by a decree of the 31st of *December*, 1838, an order was made for a nonsuit in the second suit.

In consequence of the above proceedings, *Syud Shah Newaz Khan* and *Meer Roshun Khan*, on the 23rd of *April*, 1839, filed a fresh plaint, being the third original suit, in the *Zilla* Court of *Cawnpore*, against the same Defendants, claiming by such plaint to recover the sum of Rs. 49,800, the allowances due for six years and eleven months, commencing from *May*, 1832, to the date of filing the plaint. The facts pleaded were the same as in the former suits.

The Defendants put in an answer to this plaint, whereby they insisted that the Plaintiffs were not relatives of the late *Nawab;* that after investigation by the Government authorities, the Will had, in fact, been adjudged invalid, an order having been made by the Resident and Supreme Council for the distribution of the deceased *Nawab's* estate among the legal heirs, according to the Mahomedan law, which had been done; and that until the Plaintiffs brought an action against themselves and the Government to set aside these orders, the present suit could not be sustained; and they submitted, that the Plaintiffs ought to be nonsuited on that ground; that the letters, put in evidence by the Plaintiffs in the former suit, were invalid and inadmissible; that the *Zilla* Court was not competent to entertain the matter against the order of

the Supreme Council, and that at the time when the Plaintiffs alleged that the late *Nawab* declared his Will, he was bereft of his reason and senses.

The pleadings having been concluded, the suit was brought before Mr. *Speirs*, the Judge of the *Zilla* Court at *Cawnpore*, and that Judge, on the 21st of *July*, 1840, recorded a minute which disposed of the formal objections raised by the Defendants, and proceeded thus:—"The *Vakeels* of Plaintiffs were then told, with reference to the Will itself, that Plaintiffs would have to prove two facts,—first, that *Nawab Moatumud-ood-Dowlah*, of his free will and accord, declared the Will in the presence of credible witnesses; and secondly, that when he declared his Will, *Nawab Moatumud-ood-Dowlah* was in possession of his reason and senses. To this requirement the *Vakeels* of Plaintiffs submitted the depositions of witnesses, taken and placed on the files of the former suit, in proof of both points."

The Court, at the instance of both parties, took into consideration the whole of the evidence filed in the previous suit, and examined further witnesses and documentary evidence on the part of the Defendants.

On the 11th of *May*, 1841, Mr. *Speirs* pronounced the decree of the *Zilla* Court, and after going very minutely into the whole of the evidence filed on both sides, he held, that the Will in question was proved in three ways,—first, by persons who were present when the Will was declared by the deceased; secondly, by those who were present in the *bungalow*, and heard of the Will being made from those who were present at the declaration; and thirdly, by the acknowledgment of the Defendants contained in their letters. The decree then proceeded as follows:—"It is

1851.

NAWAB AMIN-OOD-DOWLAH v. SYUD ROSHUN ALI KHAN.

a fact, that the late *Nawab*, on the 3rd of *May*, 1832, when of sound reason, in the presence of *Amin-ood-Dowlah* and others, desired that after his death Rs. 300 per month should be continued to be paid to each of the Plaintiffs. It is not, however, proved, in my opinion, that the *Nawab* directed the allowances to be paid in perpetuity, that is, in fee-simple (*nuslun bad nuslin*), as stated in the letter of *Khas Mehal*, but that the allowances were intended to be paid to Plaintiffs during their lives, as deposed to by two of the witnesses of Plaintiffs, viz. *Ali Hosein* and *Mahomed Hosein*, and as proved by the letter of *Nawab Amin-ood-Dowlah*. On the above grounds, the Plaintiffs are entitled to recover the stipends claimed by them from the estate of the late *Nawab;* that is to say, to recover from each heir such sum as bears the same proportion to the whole claim that the share allotted to the heir by distribution bears to the whole estate of *Nawab Moatumud-ood-Dowlah.*" And it was ordered, "That a decree pass against all the Defendants, in favour of the Plaintiffs, for the sum of Rs. 49,800, being the amount of the stipends from the beginning of *May*, 1832, to the end of *March*, 1839, at the rate of Rs. 7200 per annum; that the Defendants pay the costs, and that, from the date of entering suit to the date of satisfaction, the Plaintiffs receive interest on the amount claimed."

The Defendants (excepting *Khas Mehal*) appealed from this decree to the *Sudder Dewanny* Court at *Allahabad*. The appeal came before Mr. *B. Tayler*, and was heard by him on the 3rd and 6th of *February*, 1842, and on the 7th of that month he delivered the Court's decree, concurring with the *Zilla* Judge, and affirming that decree in the following

terms:—"Taking into consideration all the circumstances of the case, and after a perusal of the record, in my opinion, there are no grounds for disturbing the decision of the lower Court."

The Appellants, dissatisfied with this decree of confirmation, appealed to *England*. Pending the appeal, *Nawab Nizam-ood-Dowlah* compromised the suit with the Respondents, and his name was excluded from the appeal, and the Respondent, *Syud Shah Newaz Khan*, having departed this life, leaving *Fatima Begum* his heiress him surviving, her name was inserted as a Respondent to the appeal.

The appeal now came on for hearing.

Mr. *Stuart*, Q. C., Mr. *Forsyth*, and Mr. *Maule*, were heard for the Appellants.

Mr. *Wigram*, Q. C., Mr. *Lloyd*, Q. C., and Mr. *Edmund F. Moore*, for the Respondents, were not called upon.

The question being one of fact, the argument turned entirely upon the sufficiency of the evidence adduced by the Respondents to prove the nuncupative Will of the deceased *Nawab*, in comparison with the Appellants' witnesses. It was admitted, at the hearing, by the Appellants' counsel, that a nuncupative Will by a Mahomedan professing the *Shias* tenets, was valid by the Mahomedan law.(*a*)

(*a*) For authorities respecting nuncupative wills by Mahomedans, see Macnaghten's Principles of Moohummadan Law, p. 53. The Hidàya, a commentary on the Mussulman laws, by Hamilton, Edit. 1791, Book li. ch. i. vol. iv. p. 466 to 558; *Kishwur Khan* v. *Jewun Khan*, 1 Ben. Sud. Dew. Rep. 25.

1851.

NAWAB AMIN-OOD-DOWLAH v. SYUD ROSHUN ALI KHAN.

The Right Honourable T. PEMBERTON LEIGH:

In this case we are called upon to reverse the decisions of two Courts in *India*, upon a mere question of fact. It is said by the Appellants' counsel, and we have no doubt with perfect truth, that the Judges did not see the witnesses, and, therefore, that the Courts below had no better means of judging of the credit due to them than we have. It may be very true that they did not see the witnesses, but the Judge of the *Zilla* Court was resident on the spot. He knew the nature of the question which was in dispute; he knew the probabilities which were likely to arise in a great family like this, and the description of the different witnesses who were brought to give their testimony. At all events, the Courts below had as good, and we think better, means of judging of the credit due to the testimony than we could possibly have.

Looking at the probabilities of the case, the circumstances seem to be pretty strong in favour of the decree which has been made. Here is a man of high rank and station, with a very large income, who has a number of connections dependent upon him, to whom it is beyond dispute he was in the habit of making certain allowances for maintenance, and, though it is very possible that those allowances were not very regularly paid, yet there is nothing to show that he ever intended to withdraw his bounty from those parties; the probability rather seems to be, that he would not leave his connections, some of them females, who had been up to that time dependent upon his bounty, wholly without some provision.

In this state of probability we have the evidence of a number of witnesses on the part of the Plaintiffs, all

speaking to a nuncupative Will, to the effect stated, having been made. The answer to that is, in the first place, the production of six or seven witnesses. The first batch of witnesses, if we may so call them, are all slave girls, and the effect of their evidence is, that the deceased *Nawab*, during this period, even on the very day in which the Will is represented to have been made, became speechless, and continued to be speechless up to his death; and, therefore, he could not have made this Will.

In answer to that we have the evidence of a physician, who gives his evidence apparently with great impartiality. He says he attended him, and, so far from his being insensible up to the day of his death, he was perfectly sensible, and, so far from being speechless, he conversed during the time he saw him, and was in perfect possession of his mental faculties.

With respect to the character of the witnesses on both sides, we believe there is not a single witness on the part of the Appellants who is not either in the character of a slave, having lived in the family before the death of the Testator, or a person in the service of the Appellant. The whole effect of the evidence given against the Will is, that those persons had none of them heard the Will declared, and they allege that the Testator was not, during this time, in a situation to make it. On the other hand, some of the witnesses on behalf of the Respondents are of a very much superior class. It is true that one of them is a member of the family, the son of one of the legatees; another is a physician; another is an officer in the *Zilla* Court, described to be *Moonsiff*, who, we understand from Sir *Edward Ryan*, is a person holding a respectable situation in that Court.

1851.

NAWAB AMIN-OOD-DOWLAH v. SYUD ROSHUN ALI KHAN.

Thus the case stands upon the parol testimony. But when we come to the documentary evidence, the preponderance seems to us to be entirely in favour of the Respondents. The Appellants' counsel endeavours to get rid of the effect of a letter of the only party who is represented to have any real interest in the matter, the *Nawab* himself, by observations tending, as they contend, to show that it was not likely that such a letter should have been written. Let us see how that matter stands. The plaint was filed on the 12th of *March*, 1835; in that plaint it is alleged, that Plaintiffs demanded payment of their allowances, as settled by the deceased *Nawab*, from his heirs, who were in possession of his estate, whereupon *Nawab Amin-ood-Dowlah*, the eldest son of the deceased, in a letter to the address of the Plaintiffs, acknowledged that the deceased *Nawab* had signified his Will to the effect that Plaintiffs' allowances should continue to be paid to them; and promised to pay the same on receiving the stipend from Government. It is quite impossible to suppose that this letter, whether forged, or not forged, was not in existence at the time that this statement of its contents was made. Then, as to the letter itself, how does it stand? We have, in the first place, the evidence of a party uncontradicted and not open to any observation in cross-examination, who swears that he wrote that letter, that he wrote it by the direction of the *Nawab*, and that the *Nawab* put his seal to it in his presence. An inquiry having been directed by the Court with respect to the genuineness of that letter, the Judge of the Court after the examination stated the ground on which his opinion is formed. The objector to this letter had been called on to state whether he could suggest any ground on

which the genuineness of the seal could be doubted. "Whether he could point out any indications of fabrication." The Judge says, "There is no evidence to show that the seal of *Nawab Amin-ood-Dowlah* was ever in the custody of the Plaintiffs," and after going through the matter at some length, he says, "Considering all these facts, it is clearly proved to my mind that the letter was written and sent by *Nawab Amin-ood-Dowlah*."

But it does not even rest there, because there is a portion of the evidence of *Hakim Ahmud Ali*, which very much confirms it. He does not seem to have the smallest bias in favour of the one side or the other. He is asked, "Do you know whether, on the said Thursday, the *Nawab* declared any Will in favour of any person?" He says, "He did not declare his Will in my presence. If he made known his Will in the female company, I cannot say; but I did indeed hear talk that the *Nawab*, despairing of his life, was declaring his Will. He declared some Will, but I do not know what Will he declared, nor in whose favour;" and then he adds, "*Nawab Amin-ood-Dowlah* also acknowledged that the *Nawab* had declared his Will." In addition to this, there is the testimony of several persons who were present on the occasion, who do not speak to what the contents of the Will were, but who speak to what happened on this particular occasion on which they were present. Some disturbance and noise, they say, took place in the room in which the *Nawab* was, and then parties came out in a state of agitation, who stated that the *Nawab* was declaring his Will, and stating also what the effect was.

Against all this testimony there is nothing, except that which unfortunately we know to be of very little

1851

NAWAB AMIN-OOD-DOWLAH v SYUD ROSHUN ALI KHAN.

value in Indian cases, the depositions of a great many persons, servants and dependants upon a great man, all of whom, in nearly the same words (as respects the two classes of witnesses it is in the selfsame words), speak to some facts which are contradicted by those whose testimony appears much less open to imputation

We cannot think, therefore, that it would be of any use to investigate this case further, as we have heard all the arguments addressed to us with great ability, as they always are by the counsel who have argued this case for the Appellants, but they have not raised sufficient doubt in our minds to make us feel it necessary to call upon the Respondents for an answer. We shall, therefore, affirm the decision of the Court below, with costs

THE EAST INDIA COMPANY - - *Appellants*,

AND

NUTHUMBADOO VEERASAWMY MOODELLY - - - - - - *Respondent.**

On appeal from the Supreme Court of Judicature at Madras.

5th Dec. 1851.

Bill by a party claiming to represent the interests of certain proprietors of land, termed "*Mirasidars*" against the East India Company, for specific performance of an agreement alleged to have been entered into by them to grant compensation for the *mirasi* rights in certain lands taken possession of adversely by the Madras Government for public purposes. Upon appeal, such bill dismissed, the Judicial Committee holding, that there was no evidence of any contract by the East India Company, to sustain a bill in a Court of Equity for the relief sought.

THIS was a suit for specific performance of an agreement alleged to have been entered into by the Appellants, to pay the *Mirasidars* (*a*) of the villages of *Perambore* and *Nadumbarei*, compensation for the loss of their *mirasi* rights in a certain tract of land outside of the walls and fortifications of the Black Town of *Madras*, which had been taken possession of by the *Madras* Government for the purpose of forming an esplanade for the military defence of that quarter. The Plaintiff was the executor of one *Mangandoo Vencatachella Moodelly*, and claimed compensation for certain shares in the *mirasi* rights, which his testator had purchased from some of the *Mirasidars*.

* Present: Members of the *Judicial Committee*,—The Right Hon. Dr. Lushington, the Right Hon. Sir George Turner, Vice-Chancellor, and the Right Hon. Sir Edward Ryan.

(*a*) The holder or possessor of a heritage. As to the nature of the *mirasi* rights in *Madras*, see "Replies to seventeen questions proposed by the Government of Fort *St. George*, relative to the *mirasi* right, by *F. W. Ellis*, Collector of *Madras*."—*Madras*, A.D. 1818.

1851.

THE EAST INDIA COMPANY v. NUTHUMBADOO VEERASAWMY MOODELLY.

The original Bill was filed by *Conjeeveeram Woodundy Moodelliar*, as the executor under the Will of *Manyandoo Vencatachella Moodelly*, on the equity side of the Supreme Court of *Madras*, against *Charles Gandoin*, *Elizabeth Willins*, *Tolesinga Moodelly*, *Curpoora Moodelly*, *Yelliapermall Moodelly*, *Vengoo Munnapah Moodelly*, *Sabaputty Moodelly*, *Comarasawmy Moodelly*, *Veerasawmy Moodelly*, *Sashoo Moodelly*, *Thyell Ummall*, *Mootoogooroosawmy Moodelly*, *Amoortummall*, and *Rungasawmy Moodelly;* and the Appellants The Bill stated that, at the time of the execution of the *Malabar* deed of sale, thereinafter mentioned, the persons who executed it as vendors, and one *Yelliapermall Moodelly*, were the *Mirasidars* of the villages of *Perambore* and *Nadumbarei*, within the local limits of *Madras*, and, as such, were the proprietors of the soil of both those villages; and that the ground held by them as *Mirasidars* of the village of *Nadumbarei*, contained 37 *cawnies*, 18 grounds, and 355 square feet, and that the *mirasi*, or proprietorship of the villages, was divided into thirteen shares, and that such shares were, before and at the time aforesaid, held and enjoyed by the several *Mirasidars* aforesaid in manner following; that is to say, *Tolesinga Moodelly* and *Vadappah Moodelly* held five of such shares, *Yelliapermall* four shares, *Vengoo Munnapah* two and a quarter shares, and the remaining *Mirasidars* each one quarter of a share; that *Tolesinga Moodelly*, *Vadappah Moodelly*, *Vengoo Munnapah Moodelly*, *Sabaputty Moodelly*, *Comarasawmy Moodelly*, *Veerasawmy Moodelly*, *Sashoo Moodelly*, *Sadiappah Moodelly*, *Arnachella Moodelly*, and *Mootoogooroosawmy Moodelly*, so being ten of such eleven *Mirasidars* as aforesaid, on the 21st of *Septem-*

ber, 1837 A.D., at *Madras*, made and executed an instrument in writing, in the *Malabar* language and character, commonly called a *Malabar* deed of sale, and thereby, in consideration of the sum of 3630 *pagodas*, paid to them by *Mangandoo Vencatachella Moodelly*, for the purchase thereof, sold and assigned to *Mangandoo Vencatachella Moodelly* fifteen and one-eighth *cawnies* of ground in the village of *Nadumbarei*, forming a part of the land belonging to them, and which land, so sold to *Mangandoo Vencatachella Moodelly*, was included within the 37 *cawnies*, 18 grounds, and 355 square feet hereinbefore mentioned; that the Appellants had, long previously to the execution of the deed of sale or assignment, assumed possession from the *Mirasidars* of the whole of the 37 *cawnies*, 18 grounds, and 355 square feet of land, including the land so assigned to *Vencatachella Moodelly* in the village of *Nadumbarei*, for public purposes, and had agreed to pay for the same the value thereof to the *Mirasidars*, as the proprietors of the soil, at and after the rate of 240 pagodas, or Rs. 840, per *cawny*, but that they, the East India Company (the Appellants), had not paid any part of such value, and that, ever since they had been in possession of the ground, they had held a large sum of money in their hands for the payment thereof. The bill then stated a judgment obtained by *Myla Chittumbala Venoyaga Moodelly* against the ten *Mirasidars*, and the seizure by the Sheriff of their *mirasi* rights and interest in the two villages of *Perambore* and *Nadumbarei*, including the fifteen and one-eighth *cawnies* sold to *Mangandoo Vencatachella Moodelly*, and the sales by the Sheriff of the whole of their *mirasi* rights and interests to *Mangandoo Vencatachella Moo-*

1851

THE EAST INDIA COMPANY v. NUTHUMBADOO VEERASAWMY MOODELLY

delly, for the sum of Rs. 9030, and that the share of *Yelliapermall Moodelly* in the 37 *cawnies*, 18 grounds, 355 square feet amounted to 11 *cawnies*, 14 grounds, 1935 square feet; and that *Vencatachella Moodelly*, under and by virtue of his purchase at the Sheriff's sale, and the assignments by the Sheriff thereinafter mentioned, became and was entitled to 27 *cawnies*, 3 grounds, and 820 square feet (inclusive of the fifteen and one-eighth *cawnies*) of and in the 37 *cawnies*, 18 grounds, and 355 square feet (or the value, or compensation, payable by the East India Company in respect thereof), and also to the difference in quantity of land in the villages of *Perambore* and *Nadumbarei* between the 27 *cawnies*, 3 grounds, and 820 square feet, and the quantity which belonged and appertained to the ten *Mirasidars*, as their nine thirteenth shares of and in the villages; which last-mentioned quantity amounted to 73 *cawnies*. And, after stating the nature of the claims to the land in question set up by the Defendants, *Gandoin*, *Willins* (the former of whom claimed as a judgment creditor, and the latter under an assignment from *Yelliapermall Moodelly*), *Amôortummall*, and *Rungasawmy Moodelly*, and that *Mangandoo Vencatachella Moodelly* had compromised the claim of *Amoortummall*, by transferring to her one and one-eighth share in the 37 *cawnies*, 18 grounds, 355 square feet, which amounted to 3 *cawnies*, 6 grounds, 1000 square feet; and that such last-mentioned quantity, being deducted from the 27 *cawnies*, 3 grounds, 820 square feet, there remained 22 *cawnies*, 20 grounds, 2220 square feet; and that *Vencatachella Moodelly* thereupon became and was entitled to the 22 *cawnies*, 20 grounds, 2220 square feet, out of and in the 37 *cawnies*, 18 grounds, 355 square

feet, so assumed possession of by the East India Company, as aforesaid, or to compensation for the same. And, after stating other matters, the Plaintiff charged, amongst other things, that the Appellants ought to be put to make their election, either to pay the Plaintiff so much of the compensation-money as was due for the amount of ground so purchased by *Mangandoo Vencatachella Moodelly*, deducting the amount so given by him to *Amoortummall*, or else to give up to the Plaintiff the possession of the land so belonging to the estate of *Mangandoo Vencatachella Moodelly;* and that the Appellants ought to be restrained from paying, and the other Defendants from receiving, the compensation-money, or any part thereof; and the bill prayed, that *Mangandoo Vencatachella Moodelly* might be declared to have been in his lifetime, and at the time of his death, the purchaser, for a valuable consideration, of the nine thirteenth shares of and in the villages of *Perambore* and *Nadumbarei*, less the one and one-eighth share so transferred to *Amoortummall;* and that it might be declared that *Mangandoo Vencatachella Moodelly* was, as such purchaser as aforesaid, entitled, at the time of his death, to 22 *cawnies*, 20 grounds, and 2220 square feet (inclusive of fifteen and one-eighth *cawnies*) of and in the 37 *cawnies*, 18 grounds, and 355 square feet in the village of *Nadumbarei*, and, as such, entitled to receive all compensation payable by the East India Company in respect thereof; and that an account might be taken of the compensation-money; and interest be computed thereon from such date and at such a rate as the Court should direct; and that the amount of the share or interest of *Mangandoo Vencatachella Moodelly* in and to such principal and interest

1851.

THE EAST INDIA COMPANY v. NUTHUMBADOO VEERASAWMY MOODELLY.

monies might be ascertained, and, when ascertained, paid over to the Plaintiff, as such executor as aforesaid, he being ready and willing, and thereby offering, to execute all such lawful and reasonable deeds or assignments as might be demanded or required by the East India Company; and that the other Defendants might be decreed to do all necessary and reasonable acts in and about the premises; and that so much of the pretended assignment of *Yelliapermall Moodelly* as exceeds his own lawful and rightful share of and in the lands might be decreed to be set aside; and that the interests, if any, of *Gandoin*, *Willins*, and *Yelliapermall* might be ascertained and declared. But if the East India Company should persist in objecting to the title of the Plaintiff, as the executor of *Mangandoo Vencatachella Moodelly*, and to the title of *Mirasidars*, and the Court should be of opinion that there was any defect whatever in their title, that then the East India Company might be decreed to pay so much of such compensation-money, or value of the land assumed possession of as aforesaid, as belonged or was payable to the estate of *Mangandoo Vencatachella Moodelly*, and such interest, to be so declared, as aforesaid, within a reasonable time, to be fixed by the Court, for that purpose; and, in default, that the East India Company might be decreed to deliver up possession of the 37 *cawnies*, 18 grounds, 355 square feet over to the Plaintiff, and *Yelliapermall* and *Amoortummall*, or the Plaintiff, and *Amoortummall*, and *Willins*, or *Gandoin*, as the case might be, as representing and taking under the *Mirasidars* of the villages so originally in the possession of the lands taken possession of by the East India Company; and that, in such last-mentioned case, it might

BENGAL SECRETARIAT
LIBRARY

1801.

THE EAST INDIA COMPANY v. NUTHUMBADOO VEERASAWMY MOODELLY.

be referred to the Master to take an account of the rents and profits of the lands; and that the East India Company might be decreed to pay a reasonable occupation-rent for the same; and that the East India Company be restrained from paying, and the other Defendants, and each and every of them, from receiving, the compensation-money, or any part thereof.

The Appellants, by their answer, stated that they, through their Government of Fort Saint George, and in manner and by the course and for the purpose hereinafter next stated, but not otherwise, did take possession of a considerable tract of land, for the purpose of forming and keeping clear the West esplanade on the outer side of the walls and fortifications of the Black Town of *Madras*, such esplanade being required for the defence in war of the Black Town, the Government of Fort Saint George, in the year 1783, for the purpose of forming such esplanade; and in the assertion of the right of these Defendants as owners of the soil, they did clear such tract of land as aforesaid from all occupations to the extent of six hundred yards' distance from the walls; that, afterwards, several persons having taken possession of many parts of such tract of land, and occupied the same by cultivation, and in making of salt, and in other ways, these Defendants, through their Government, did, between the years 1813 and 1816, again resume and take possession of such tract of land, by clearing the same from all such occupation, and by keeping the same so cleared and in their own occupation from thence hitherto. They admitted that a portion of such tract, and to the extent in the bill mentioned, was, from time to time, and for many

1851

THE EAST INDIA COMPANY v. NUTHUMBADOO VEERASAWMY MOODELLY.

years, occupied, and used, and enjoyed, either in cultivation or in making salt, by certain persons called the *Mirasidars* of the villages of *Perambore* and *Nadumbarei*, who claimed so to occupy, use, and enjoy the same in virtue of their *mirasi* rights. They also admitted that they were willing and directed that a sum of money should be paid for the land taken possession of by them to the parties respectively entitled as *Mirasidars* to the same, at and after the rate stated in the bill, upon condition of such parties giving to them a full and sufficient conveyance of the land, and release of and from all claims upon the Appellants in respect thereof; but they denied that any agreement or promise was made by or between them and those parties respectively, or that they agreed, or promised, or consented to pay, in any manner, or in any other sense save as aforesaid, for the said land, the value thereof, and that any money had ever been in any manner set apart for the payment of any such compensation, and stated, that inasmuch as no person had appeared showing any title to any such compensation as in the bill was mentioned, or able to comply with the conditions required by the Appellants, they had not paid any such compensation; but they said that, for the purposes of liquidating any claims which might be from time to time established for compensation under their directions, and upon the conditions as thereinbefore mentioned, they had, since the year 1813, authorised the Treasurer of Fort Saint George to hold disposable various sums of money from time to time, but not any particular sum, for the payment of any such compensation as in the bill mentioned, nor did they hold any large or other particular sum for such last-mentioned purpose. They further

said, that the Collector of *Madras* for the time being was authorised to act for them, and in this behalf, with respect to the land in question, so far as to inquire and report to the Board of Revenue upon claims made to it, with a view to the orders of Government thereon, but not otherwise; and that neither the alleged *Mirasidars*, nor *Mangandoo Vencatachella Moodelly* in his lifetime, nor the Plaintiff since his decease, had ever offered to produce or show to the Appellants a good and valid title to the land, or any part thereof; nor had any of them ever tendered to the Appellants or offered to give and execute a full and valid conveyance of the land, or any part thereof. They also stated, that the land in question was barren and unproductive, and was frequently flooded and overflowed by salt-water, and that there had been no profits arising from it.

The other Defendants, except *Tolesinga Moodelly*, appeared, and put in separate answers, which it is not necessary to notice, as the suit was substantially between the Plaintiff and the Appellants.

Pending the suit, *Conjeeveeram Woodundy Moodelliar*, the Plaintiff, died, having previously made a Will, whereby he appointed *Nuthumbadoo Veerasawmy Moodelly*, the present Respondent, his sole executor, who, on the 4th of *February*, 1844, exhibited a bill of revivor, in the same suit, against the Appellants and the other Defendants.

The hearing of the cause took place on various days in the month of *March*, 1846, before the Chief Justice (Sir *Edward Gambier*) and Sir *W. Burton*, Puisne Judge, when evidence, both documentary and by the depositions of witnesses, was gone into on both sides. The only evidence adduced by the Plaintiff to

1851.

THE EAST INDIA COMPANY v. NUTHUMBADOO VERRASAWMY MOODELLY.

prove that the Appellants had entered into any agreement or incurred any legal or equitable liability to pay compensation to parties who claimed to be entitled to the land in question, consisted of the documents marked respectively, A. No. 20, A. No. 22, A. No. 23, and A. No. 24. These documents are mentioned and referred to in the judgment.

On the other hand, the Appellants adduced evidence to prove that the *Malabar* deed of sale of the 21st *September*, 1837, was a mere colourable instrument, executed by the *Mirasidars*, for the purpose of enabling *Mangandoo Vencatachella Moodelly* to recover from the Appellants, compensation for fifteen one-eighth *cawnies* of land, which thereby purported to be sold to him, and that no consideration-money was paid or intended to be paid by the pretended purchaser.

The Court pronounced the following decree, bearing date, the 21st of *March*, 1846:—"This Court doth order that it be referred to the Master of this Court to inquire, whether the Complainant and Defendants, other than the Defendants, the East India Company, or any of them, can give to the Defendants, the East India Company, a full and sufficient conveyance of such portion of the tract of land forming the West esplanade on the outer side of the walls and fortifications of the Black Town of *Madras*, taken possession of by the Defendants, the East India Company, in 1783, and again resumed by the Defendants, the East India Company, between 1813 and 1816, and in the pleadings mentioned, as is situated within the village of *Nadumbarei*; and whether the Complainant and the Defendants, other than the Defendants, the East India Company, or any of them, can give to the said Defendants, the East

India Company, a full and sufficient release of and from all claims on the Defendants, the East India Company, in respect of such portion aforesaid; and that the Master do state his opinion thereon to the Court, with liberty to state any special circumstances. And this Court doth order that the Master do inquire and report whether any and what consideration passed between the parties to the *Malabar* deed of sale, in the pleadings mentioned, and bearing date the 21st of *September*, 1837, or between any of them; and also whether any and what sum or sums of money was or were paid by *Mangandoo Vencatachella Moodelly*, in the pleadings mentioned, as and for the purchase-monies or consideration respectively stated in, and appearing upon the face of, the nine several assignments by the Sheriff, in the pleadings mentioned, and bearing date respectively the 12th of *February*, 1840."

The Court transmitted to the Judicial Committee of the Privy Council the following reasons for making the above interlocutory decree, so far as concerned the Defendants, the East India Company:—

"1. The parties under whom the Plaintiff claims, or some of them, appear to us to have established their title as *Mirasidars* of the villages or united village of *Perambore* and *Nadumbarei*. This conclusion is founded on the Exhibits, A. 20, A. 22, A. 23, A. 24, and upon the evidence of *Valoyda Moodelly*.

"2. The Plaintiff's equity is analogous to that of a vendor, who comes into Court seeking a discovery from the vendee, offering a conveyance and demanding his purchase-money. And the interlocutory order complained of, is merely a reference to the Master for the purpose of ascertaining whether any of the parties

1851.

THE EAST INDIA COMPANY v. NUTHUMDADOO VEERASAWMY MOODELLY.

before the Court have such a title to the land as will enable them to make an effectual conveyance of it to the East India Company, and will secure the latter from all further claims in respect of it.

" 3. The Plaintiff has a further ground for coming into a Court of Equity; namely, that complete relief could not be given in a Court of Law. Originally, according to the Plaintiff's case, this was a mere trespass; but the aspect of it is now changed. The Defendants, the East India Company, say they hold a sum of money which they directed should be paid by way of compensation for the land to the parties respectively entitled as *Mirasidars* to the same, upon condition of their giving to the Company a full and sufficient conveyance and release. This sum is not allotted as damages for the trespass. The *Mirasidars* may waive the trespass and claim the benefit of this engagement, for entering into which the possession of the land by the East India Company is a sufficient consideration; but the *Mirasidars* can only do this in a Court of Equity, where alone a conveyance and release can be decreed.

" 4. Whatever equity the *Mirasidars* themselves possessed, the Plaintiff, who claims under them, must have the same."

The Defendants, the East India Company, appealed from the above decree.

The Respondent did not appear, and after a day had been appointed for the hearing, the appeal was postponed, at the instance of the Appellants, until the Respondent had been served in *India* with notice that the appeal would be heard *ex parte* if he did not enter an appearance. No appearance, however, having been entered, and the Respondent having been personally

served, the appeal was set down *ex parte*, and now came on for hearing.

Mr. *Wigram*, Q.C. (with whom was Mr. *Lloyd*, Q.C., and Mr. *Forsyth*), for the Appellants.

No title to relief in equity was established against the Appellants. The bill is for specific performance of a contract, but the evidence adduced by the Respondent in the suit entirely failed to establish any contract or agreement made or entered into on the part of the Appellants, whereby they became liable, legally or equitably, to pay to the Plaintiff, or the parties through whom he claims, the value or compensation for the land taken by the Appellants, *Morgan* v. *Birnie* (*a*). All that the evidence established was, that it was a matter of favour, not of right, to make compensation. The Appellants by their answer admitted that they were willing to make reasonable compensation to persons who could establish, to their satisfaction, that they had originally a title to the land taken by them on behalf of the Government in 1783, and if, therefore, the original Plaintiff considered himself entitled to claim compensation, he ought to have submitted his claim to the Solicitor for the Appellants, to whom all such claims had been referred. But even if this is to be viewed as a contract between a vendor and purchaser, as the Court below treats it, the decree is erroneous: it ought to have directed the purchase-money to be paid into Court, *Wickham* v. *Evered* (*b*), as the purchaser took possession without the consent of the vendor.

(*a*) 9 Bing 672.
(*b*) 4 Mad 53, and see Blackburn *v.* Stace, 6 Mad. 60.

1851.

THE EAST INDIA COMPANY v. NUTHUMBADOO VEERASAWMY MOODELLY.

The VICE-CHANCELLOR TURNER:

It does not appear to their Lordships to be necessary to hear any other Counsel on the subject. This is in the nature of a bill for the specific performance of an agreement. The allegation of the bill on which the whole equity is founded is this—"That the East India Company had, long previously to the execution of the assignment, or deed of sale, therein mentioned, assumed possession from the *Mirasidars* of the whole of the 37 *cawnies*, 18 grounds, and 355 square feet of land, including the land so assigned to *Vencatachella Moodelly*, in the village of *Nadumbarei*, for public purposes, and had agreed to pay for the same the value thereof to the *Mirasidars*, as the proprietors of the soil, at and after the rate of 204 *pagodas* or Rs. 804 per *cawnie*, but that the East India Company had not paid any part of such value, and that ever since they had been in possession of the ground, they had held a large sum of money in hand for the payment thereof." It is incumbent upon the Plaintiff, therefore, in order to maintain any right to relief in equity, to prove that agreement.

The documentary evidence upon which the agreement is attempted to be founded, consists of four documents. The first document, A. No. 20, seems to have no reference whatever to any case of contract between the Company and the *Mirasidars*, but rather refers to the case of some agreement between them in respect of a lease of the property there mentioned. The second, A. No. 22, is a *sunnud* by the Company to *Cundah Pillay* and *Mirasi Conicopoly*, of the villages of *Perambore* and *Nadumbarei*. It is as follows:—"Upon your seeing this *takeed*, or order, you must immediately take the account of the

shares of the *mirasi* of the said village, and attend our *Huzzoor Cutcherry* with the same." It is quite clear that that account might be taken for very many other purposes than the purposes of the alleged agreement.

The next document, A. No. 23, in truth proves that it was not so intended; it is in these terms:—"You must call at our *Huzzoor Cutcherry*, and be in attendance at 10 o'clock in the morning of Saturday, the 22nd instant, and bring and produce all such accounts in your possession which give a particular account of the privilege and right by which you are entitled to continue to hold and enjoy the villages called *Perambore* and *Nadumbarei*. If the afore-mentioned villages are divided, and if the shares thereof are continued to be held and enjoyed separately, then you must acquaint us with full particulars, when and by whose orders such division took place, and on whose account such shares were first made. As a correct registry-book is to be opened under the orders of *Maharaja Rejustry*, the members of the Board of Revenue, it is necessary that the *Circar* should know the full particulars of this matter." It is obvious, therefore, that what the parties had in view in this document was, that there was a correct Registry Book to be opened, and it was necessary that correct admeasurements should be made for the purpose of this Registry; it does not, therefore, amount to any evidence of contract between the parties.

The fourth document, A No. 24, does refer to some question of compensation: it is addressed to *Tolesinga Moodelly* and *Yelliapermall Moodelly*, *Mirasidars* of *Perambore* and *Nadumbatei*, and others, and is in these terms:—"You are hereby commanded, that is to say,

1851.

THE EAST INDIA COMPANY v. NUTHUMBADOO VEERASAWMY MOODELLY.

as the lands for which you have solicited and claimed compensation are again to be measured by the surveyor attached to our department, you must, therefore, proceed there to-morrow morning about gun-firing, and show to the surveyor, Mr. *Gantz*, all such and such lands which you declare to be your own." That document is put forward as a statement on the part of the parties who are now represented by the present Plaintiff, that those parties had solicited and claimed compensation. But it is no admission on the part of the Appellants in this appeal, that any such claim had been in any degree recognised by them.

Looking at the parol evidence in the case, it does not appear to their Lordships that that evidence carries the case at all further. There is no proof of any parol contract. It is clear, that the East India Company, in the first instance, had entered upon this land for public purposes, adversely, and it is not, therefore, a case where possession having been taken under contract, it became necessary to ascertain the terms on which that contract was founded. There are cases in which the Court will go to a great extent in order to do justice between the parties where possession has been taken, and there is an uncertainty about the terms of the contract. But here the possession was originally taken adversely, and there is no reason, therefore, why the Court should extend its equitable jurisdiction for the purpose of dealing with what appears clearly to be a mere legal question between the parties.

With reference to the reasons which are assigned for the conclusion which the Court below has arrived at, we think that the statement of learned Judges,

"that the Plaintiff's equity is analogous to that of a vendor," is not well founded. If there be any equity at all, it must be founded upon a contract, and nothing else. It must be upon that alone the equity is founded. The second paragraph of the reasons for the judgment falls to the ground. The reference to the Master ought not to be made, unless there was some equity upon which it could be founded, and that must depend simply upon the question of contract, or no contract. With reference to the further reason, contained in the third paragraph, for coming into a Court of Equity, namely, "that complete relief could not be given in a Court of Law," it does not always follow that relief can be given at equity because relief cannot be given at law. There must be a case made out for such relief in equity. So, with reference to the argument founded upon the assumption, that the East India Company had themselves appropriated money for the purpose of answering this contract, there is no evidence of any communication being made to these parties that any such appropriation had been made. The appropriation itself is evidence of an intention on the part of the East India Company to contract for the purchase, but it is no evidence of any such contract having been actually made.

Their Lordships, therefore, are of opinion, that the decree cannot be maintained.

We do not think it is a case for giving costs in the Court below: the parties have mistaken their remedy. The East India Company have been in possession of the land for a long time. The proper course will be to dismiss the bill without costs.

HER HIGHNESS RUCKMABOYE - *Appellant*,

AND

LULLOOBHOY MOTTICHUND - - *Respondent*.*

On appeal from the Supreme Court of Judicature at Bombay.

5th, 6th, & 7th Dec., 1851; & 26th & 27th Nov., 1852.

THIS was an action of trover, in which the Appellant was the Plaintiff, and the Respondent and *Sewlall Mottichund*, since deceased, were Defendants.

* Present at the first hearing, on the 5th, 6th, and 7th December, 1851: The Right Hon. Dr. Lushington, the Right Hon. Sir George Turner (Vice-Chancellor), and the Right Hon. Edward Ryan.

Present at the second hearing, on the 26th and 27th November, 1852: Lord Truro, Lord Cranworth, the Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. Dr. Lushington, the Right Hon. Sir George Turner (Vice-Chancellor), the Right Hon Sir Edward Ryan, and the Right Hon. Sir John Patteson.

The English Statute of Limitations, 21 *Jac.* I., c. 16, extends to *India*, and applies to Hindoos and Mahomedans as well as Europeans, in civil actions in the Supreme Court.

The law of prescription, or limitation, is a law relating to procedure, having reference only to the *lex fori*.

Where a Court entertains a cause of action which originated in a foreign country, the rule is to adjudicate according to the law of that country, yet the Court proceeds according to the prescription of the country in which it exercises jurisdiction.

Where words have been long used in a technical sense, and have been judicially construed to have a certain meaning, and have been adopted by the Legislature as having a certain meaning prior to a particular Statute, in which they are used, the rule of construction of Statutes requires, that the words used in such Statute should be construed according to the sense in which they have been so previously used, although that sense may vary from the strict literal meaning of the words.

The words in the Statute of Limitations, 21 *Jac.* I., c. 16, s. 7, "beyond the seas," are synonymous, in legal import, with the words "out of the realm," or "out of the land," or "out of the territories," and are not to be construed literally.

Trover for 200 chests of opium, both parties were Hindoos. The Defendant pleaded in bar, the English Statute of Limitations, 21 *Jac.* I., c. 16, in the ordinary form. Replication, that the Plaintiff resided during the period of prescription at *Malwa*, in *India*, without the terri-

The plaint alleged, that the Appellant, Her Highness *Ruckmaboye*, of *Malwa*, a Hindoo, was possessed at *Bombay*, as of her own property, of two hundred chests of opium, and that the Respondent and *Sewlall Mottichund*, Hindoo inhabitants, trading in *Bombay*, under the name and firm of *Brizlall Mottichund*, and,

tories of the Government of the East India Company, and without the jurisdiction of the Supreme Court of *Bombay*. Rejoinder, that the Defendant, though not personally resident at *Bombay*, carried on business there by a *Mooneem* or *Gomastah*, an inhabitant of *Bombay*, and subject to the jurisdiction of the Supreme Court, and that the goods were the property of Defendant. General demurrer to rejoinder. The Supreme Court at *Bombay* held, first, that as the Statutes of Limitation, 21 *Jac.* I., c. 16, and 4 Anne, c. 16, applied to *Bombay* and to Hindoos, the fact of the Plaintiff being resident at *Malwa* was not "beyond the seas," so as bring the Plaintiff within the 7th section of the 21 *Jac.* I., c. 16; and, secondly, that the carrying on business at *Bombay* amounted to a constructive inhabitancy at *Bombay*, so as to exclude her from the benefit of the exception in the Statute. Upon appeal, held by the Judicial Committee, reversing the judgment of the Supreme Court,—

First. That the saving words of the Statute, 21 *Jac.* I., c. 16, s. 7, "beyond the seas," were not to be construed literally, those words being in legal import and effect synonymous with the words "without the territories," and that the replication disclosed a valid answer to the Defendant's plea, and, as the words of the replication, "without the territories," were equivalent to the words "beyond the seas," the Plaintiff was within the express provision of the seventh section, and that the plea, setting up the Statute, was no bar.

Second. That the rejoinder, that the Plaintiff might sue or be sued during the time by reason of a constructive inhabitancy, was no answer in law to the replication; for although it might give the Court jurisdiction, yet it did not prevent the express operation of the 7th section of the 21 *Jac.* I., c. 16.

The Charter of the 8th *December*, 1823, which created the Supreme Court at *Bombay*, provides by section 29, that, "in cases of Mahomedans or Gentoos, their inheritance, and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined, in cases of Mahomedans, by the laws and usages of the Mahomedans, and where the parties are Gentoos, by the laws and usages of the Gentoos, or by such laws and usages as the same would have been determined, if the suit had been brought in a Native Court;" and the 37th section directs, that "the Court shall frame such process, and make such rules and orders for the execution of the same, in all suits, civil and criminal, to be commenced, sued, or prosecuted, within their jurisdiction, as shall be necessary for the due execution of all or any of the powers thereby committed thereto, with an especial attention to the religion, manners, and usages of the native inhabitants living within its jurisdiction, and accommodating the same to their religion, manners, and usages, and to the circumstances of the country, so far as the same can consist with the due execution of law and the attainment of substantial justice."

Held upon a construction of these sections, that, as the law of limi-

1851-2.

HER HIGHNESS RUCHMABOYE v. LULLOOBHOY MOTTICHUND.

therefore, persons subject to the jurisdiction of the Supreme Court, afterwards converted them to their own use. To this plaint the Respondent and *Sewlall Mottichund* pleaded, first, not guilty; secondly, not possessed; and thirdly, that the causes of action in the plaint mentioned, did not, nor did any of them, accrue to the Appellant at any time within six years next before the commencement of the suit.

After pleading these pleas, and before replication, *Sewlall Mottichund* died, whereupon a suggestion was entered on the roll, that *Sewlall Mottichund* had died, and that the Respondent had survived him.

The Appellant replied to the pleas of the Respondent and *Sewlall Mottichund*, and joined issue on the first and second pleas, and to the third plea she replied, that, at the time when the causes of action in the plaint mentioned, and each of them, accrued, she, the Appellant, was residing in *India*, in parts without the territories subject to the government of the East India Company, and without the jurisdiction of the Supreme Court, to wit, at *Rutlam*, in *Malwa;* and that she, the Appellant, did not, at any time from the time when the causes of action accrued, until within six years of the day of the commencement of the suit, come or return within the territories, or within the jurisdiction of the Court.

To this replication to the third plea, the Respondent pleaded, by way of rejoinder, that the Ap-

tation is a matter of procedure, and the Supreme Court at *Bombay* had power to frame its procedure different from the Native Courts, the Court was right in allowing the plea of the English Statute of Limitations, in an action between Hindoos upon a Hindoo contract, as the judgment of the Court on such plea was no determination relating to any right arising out of any contract or dealing involved in the cause of action.

Semble.—The mere allegation in the plaint, that the parties are Hindoos, is a sufficient averment of the fact to raise an objection to the suit being decided by the English law of limitations.

pellant, for a long time previously to and at the time when the alleged causes of action, and each and every of them, accrued to her, and from thence up to and until the time of the commencement of that suit, though personally resident in *Malwa*, was, and continued to be, a Hindoo, and carried on, and still carries on, the business or trade of merchandize at a shop or house of business situate in *Moombadaveestreet*, in *Bombay*, under the name and style of *Gunessdass Kistnajee*, by a *Mooneem* or *Gomastah*, named *Amerchund Keshorechund*, and during all that time was, and continued to be, an inhabitant of *Bombay*, and subject to the jurisdiction of the Court, and that the goods and chattels in the plaint mentioned, were, at the time of the trover and conversion thereof in the plaint mentioned, in *Bombay*, and the goods and chattels of the Appellant's *Bombay* firm.

To this rejoinder the Appellant demurred generally, and the Respondent joined in demurrer.

The point marked by the Appellant for argument of the demurrer was, "That the constructive residence of the Appellant in *Bombay*, at the time when the cause of action accrued, or at any time since, was immaterial, if the Appellant were at that time actually and in fact residing beyond the territories subject to the government of the East India Company."

The demurrer was argued on the 14th of *November*, 1848, and the 23rd of *February*, 1849, before Sir *Erskine Perry*, Chief Justice, and Sir *William Yardley*, Puisne Judge, of the Supreme Court, when it was adjudged by the Court, that the rejoinder of the Respondent to the replication of the Appellant to the third plea was sufficient in law; and, by an order of the Court made on the last mentioned day, it was

1851–2.

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND.

ordered, that the demurrer should be overruled, with costs.

In compliance with the rule of the Privy Council (*a*), the Judges of the Supreme Court transmitted to the Privy Council the following reasons, which governed the Court in overruling the demurrer to the third plea:—

"The Supreme Court at *Bombay*, having, for some years past, held that the Statutes of Limitation (21 *Jac.* I., c. 16 (*b*), and 4 *Anne*, c. 16) apply to *Bombay* and to Hindoos, as well as to Europeans, on the ground of such laws being laws affecting procedure, and not affecting the contract (see *Story's* Conflict of Laws, p. 483, *Edin.*), the point argued before us was, whether the Plaintiff, not residing personally within the jurisdiction of the Supreme Court of *Bombay*, was not to be considered as being 'beyond the seas' at the time of the cause of action accruing and of its being commenced.

(*a*) See rule, 3 Moore's Ind. App. Cases, p. xi.

(*b*) The section of this Statute upon which the question raised turned, was the 7th; it is as follows —

"Provided nevertheless, and be it further enacted, That if any person or persons that is or shall be entitled to any such Action of Trespass, Detinue, Action sur Trover, Replevin, Actions of Accounts, Actions of Debts, Actions of Trespass for Assault, Menace, Battery, Wounding or Imprisonment, Actions upon the Case for Words, be or shall be at the time of any such Cause of Action given or accrued, fallen or come, within the Age of Twenty-one Years, *Feme Covert*, *Non Compos Mentis*, imprisoned or beyond the Seas; that then such Person or Persons shall be at Liberty to bring the same Actions, so as they take the same within such Times as are before limited, after their coming to or being of full age, Discovert, of sane Memory, at Large, and returned from beyond the Seas, as other persons having no such Impediment should have done. 20 *Hen.* III., c. 8; 3 *Ed.* I., c. 39; 32 *Hen.* VIII., c. 2; 1 *Ma.* I., sess. 2, c. 5."

"*Rutlam* is one of the petty *Rajpoot* rajahships of *Malwa*, adjoining the *Bombay* Presidency, and tributary to *Scindia*, under the guarantee of the British Government. The Plaintiff, who, by her title, is probably connected with the ruling family in *Rutlam*, appears, by the record, to keep a money-shop in *Bombay*, under an assumed name, which is a custom very prevalent amongst monied natives of rank in most parts of *India*.

"We thought that the expression 'beyond the seas' which can only be applied *cy prés* in *India*, did not include a place situated like *Rutlam*: and the case of *King* v. *Walker* (1 W. Bla. 286) clearly shows, that the being without the jurisdiction of the Court is not equivalent to the above expression.

"We also thought, that the carrying on a business or trade in the island of *Bombay* amounted to a constructive presence in the island, so as to exclude the exception in the Statute, even if *Rutlam* were to be considered as coming within the expression 'beyond the seas;' and we conceived, that the like conclusion would be arrived at by the Courts of Westminster Hall, if one of the great banking-houses in *London*, such as *Coutts'* or *Hammersley's*, which are often known to have been represented by a single individual, were to claim the right of bringing an action of assumpsit twenty years after the contract was made, on the ground, that the individual had been, during the period, 'beyond the seas.'"

From the above judgment the present appeal was brought.

The Appellant, in support of the appeal, submitted that the judgment of the Supreme Court ought to be reversed, for the following reasons:—

1851-2.

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND.

First. Because the Statute of Limitations, the 21 *Jac.* I., c. 16, did not extend to *India*.

Second. Because, at all events, it did not apply to an action between Hindoos.

Third. Because, even assuming that the Statute did extend to *India*, and also, that it applied to an action between Hindoos, yet that it sufficiently appeared that the Appellant was within the exceptions and saving proviso of the Statute.

The Respondent, on the other hand, relied upon the following reasons in support of the judgment of the Court below:—

First. Because the rejoinder of the Respondent to the replication of the Appellant to the third plea of the Respondent was sufficient in law.

Second. Because, under the circumstances, and under Reg. III. of 1827, the Appellant was an inhabitant of the island of *Bombay*, and subject to the jurisdiction of the Supreme Court at the time when the cause of action in the plaint mentioned accrued, and ever since had been entitled to sue and liable to be sued in that Court.

Third. Because, inasmuch as the Appellant replied to the Respondent's third plea and tendered an issue thereon, it was not competent to the Appellant to object, and she was estopped from objecting, that the matters in the third plea pleaded, and the Statutes on which such matters were and are founded, were not nor are applicable to *India*.

Fourth. Because any judgment given for the Appellant on the plaint would be erroneous and bad in law, inasmuch as there was gross and manifest error in the Record and proceedings in this, to wit, that although the Appellant by her plaint complained

1851-2.

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND.

that the Respondent wrongfully converted to his use "certain goods and chattels, to wit, two hundred chests of opium," yet she nowhere stated the value of such opium or chests, or of any part of it, or if it was of any value, and consequently, no damages could be given against the Respondent in respect of such alleged wrongful conversion.

5th, 6th & 7th Dec., 1851.

The appeal was twice argued; in the first instance* by

Mr. *Peacock*, Q. C., and Mr. *Leith*, for the Appellant; and

Sir *Frederick Thesiger*, Q. C., Mr. *Whateley*, Q. C., and Mr. *Bailey*, for the Respondent.

The case stood over for consideration. As the Committee who heard the appeal did not agree in opinion, the case was directed to be re-argued by one Counsel on each side, and additional members of the Committee attended the hearing.†

26th & 27th Nov. 1852.

The appeal was re-argued by

Mr. *Leith* for the Appellant; and

Mr. *Whateley*, Q. C., for the Respondent.

The points relied upon in the arguments are distinctly stated and commented upon in the judgment.

On the question of the application generally of Eng-

* Present: The Right Hon. Dr. Lushington, the Right Hon. Sir George Turner (Vice-Chancellor), and the Right Hon. Sir Edward Ryan.

† The Committee present at the second argument were, Lord Truro, Lord Cranworth, the Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. Dr. Lushington, the Right Hon. Sir George Turner (Vice-Chancellor), the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

1851-2

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND.

lish Statutes to *India*, *The Mayor of Lyons* v. *The East India Company* (*a*), *Ramchurn Chuckerbutty* v. *Radamohun Chuckerbutty* (*b*), *D'Conto* v. *Da Costa* (*c*), *Ramloll Thackoorseydass* v. *Soojummull Dhondmull* (*d*), *Attorney-General* v. *Stewart* (*e*), 1 *Smoult & Ryan's* Rules & Orders, p. v., were cited; and, upon the extension to *India*, of the Statute of Limitations, 21 *Jac.* I., c. 16, *The East India Company* v. *Oditchurn Paul* (*f*), *Gyanchund Shaw* v. *Mirza Mahomed Cazim Ally Khan* (*g*), *Attaram Sircar* v. *Baillie* (*h*), *Verelst* v. *Levett* (*i*), *Kistnochunder Sircar* v. *Ramdhone Nundy* (*k*), *Trelochun Chatterjee* v. *Phillips* (*l*), *Mohun Persad Takoor* v. *Loll Beharry Takoor* (*m*), *Williams* v. *Jones* (*n*). Act, No. 14, of 1840 (introducing into *India* the 9 *Geo.* IV., c. 14) (*o*).

And, assuming the Statute extended to *India*, whether it applied in an action of trover in the Supreme Court at *Bombay* by Hindoos. The Court being bound by the Statutes, 21 *Geo.* III., c. 70, s. 17; 37 *Geo.* III., c. 142, s. 13; 4 *Geo.* IV., c. 71, secs. 7 & 9; 3 & 4 *Will.* IV., c. 85; and *Bombay* Charter, 8th of *Dec.*, 1823, secs. 29 & 32, to decide the question, according to the Hindoo law. By which law the lowest limitation of suits is ten years. 1 *Colebrooke's* Dig., ch. cxiii.; 1 *Strange's* Hindoo Law, p. 308, 2 *ib.* 465. 477 (2nd edit.); 2 *W. Macnaghten's* Principles and Precedents of

(*a*) 1 Moore's Ind. App. Cases, 175.
(*b*) Morton's Decisions of Sup. Court, 353.
(*c*) Morton's Dec S. C. 356. (*d*) 4 Moore's Ind App. Cases, 339.
(*e*) 2 Merivale's Rep. 143. (*f*) 5 Moore's Ind. App. Cases, 43.
(*g*) Morton's Dec. S. C. 337. (*h*) Morton's Dec. S. C. 336.
(*i*) Morton's Dec. S. C. 340. (*k*) Morton's Dec. S. C. 345.
(*l*) Morton's Dec. S. C. 341. (*m*) Morton's Dec. S. C. 342.
(*n*) 13 East, 439.
(*o*) Theobald's Acts of the Legislative Council of India, p. 390.

Hindoo Law, 269; *Mahadan Dutt* v. *Mutteechund* (*a*); *Bengal* Regulations, III. of 1793, s. 14, and II. of 1805, s. 3, cl. 3; *Bombay* Reg. V. of 1827, ch. 1, s. 3, cl. 1; *Bombay* Code, p. 186.

And, upon the question of the application of the *lex fori*, whether the English or Hindoo law of limitations was the rule, the following authorities were referred to: *The British Linen Company* v. *Drummond* (*b*), *Higgins* v. *Scott* (*c*), *De la Vega* v. *Vianna* (*d*), *Donn* v. *Lippmann* (*e*), *Huber* v. *Stiener* (*f*), *Johnstone* v. *Beattie* (*g*), *Trimbey* v. *Vignier* (*h*), *Bury* v. *Goldner* (*i*), *Beerchund Podar* v. *Ramanath Tagore* (*k*), *Sree Mutty Moha Ranee Comulcoonry* v. *Russickchunder Naoghy* (*l*), *Story's* Conf. of Laws, ch. xiv. secs. 556-7, 577. 579 (2 edit.), 1 *Burge's* Comm. on Col. & For. Law, ch. i. pp. 24 & 27, *Story* "On Bills of Exchange," ch. v. s. 146 (Edit. 1843).

Upon the construction of the words of the exception in the Statutes, 21 *Jac.* I., c. 16, s. 7, and 4 *Anne*, c. 16, s. 19, "beyond the seas," being synonymous in legal import to the words "out of the realm," used in the previous Statutes of Limitation, 1 *Rich.* III., c. 7, s. 3, 4 *Hen.* VII., c. 24, 32 *Hen.* VIII., c. 2, s. 9, *King* v. *Walker* (*m*), *Stowel* v. *Lord Zouch* (*n*), *Lane* v. *Bennett* (*o*), *Nightingale* v. *Adams* (*p*), *Battersby* v. *Kirk* (*q*),

(*a*) Morton's Dec. S. C. 344.
(*b*) 10 B. & C. 903.
(*c*) 2 Barn. & Ad. 413.
(*d*) 1 Barn. & Ad. 284.
(*e*) 5 Clk. & Fin. 1.
(*f*) 2 Bing. N. C. 202; S. C. 2 Dowl. Prac. Cases, 781.
(*g*) 10 Clk. & Fin. 42.
(*h*) 1 Bing. N. C. 151.
(*i*) 1 Dowl. & Lown. 834.
(*k*) 1 Taylor & Bell's S. C. Reps. 131.
(*l*) Bignell's Reps. 13.
(*m*) 1 W. Bla. 286.
(*n*) 1 Plowden's Rep. 376.
(*o*) 1 Mee. & Wels. 70.
(*p*) 1 Show. 91.
(*q*) 2 Bing. N. C. 584.

1851-2.

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND.

Verelst v. *Levett* (*a*), *Dwarris* "On Statutes," 557. 669 (2nd edit.), 3 *Burge's* Comm. on Col. & For. Law, 117, Co Litt 260. a., 260. b., 261. a, 261. b., Statutes, 32 *Hen.* VIII, c. 2, 1 *Mar.*, Sess. 2, c. 5, 4 *Anne*, c. 16, s. 19, and 3 & 4 *Will.* IV., c. 27, were referred to.

And, upon the fact pleaded in the replication, of the Plaintiff being, at the time when the cause of action accrued, a resident at *Malwa*, an independent State without the territories of the East India Company, being within the saving of the 7th section, *Smith* v. *Hill* (*b*), *Perry* v. *Jackson* (*c*), *Williams* v. *Jones* (*d*), *Strithorst* v. *Græme* (*e*).

As to the constructive inhabitancy of the Appellant at *Bombay*, by carrying on business there by a *gomastah*, who was amenable to the jurisdiction of the Supreme Court, *Bombay* Reg. III. of 1827, c. 1, s. 3, cls. 1 & 2. *Thomson* v. *Davenport* (*f*), were cited.

On the objection to the pleadings. That it was necessary to aver that the parties were Hindoos to entitle the Plaintiff to insist upon the Hindoo law of limitations being applied, *Mahadan Dutt* v. *Mutteechund* (*g*), *Mohun Persad Takoor* v. *Loll Beharry Takoor* (*h*). That there was error upon the record, the plaint omitting to aver the value of the opium converted, and consequently that no damages could be given in respect of such conversion, *The Mayor of Reading* v. *Clarke* (*i*), *Arbouin* v. *Anderson* (*k*), *Darling* v. *Gur-*

(*a*) Morton's Dec. 340 (*b*) 1 Wils. 134.
(*c*) 4 Term Rep. 516. (*d*) 13 East, 439.
(*e*) 2 W. Bla. 723; S. C. 3 Wils. 145.
(*f*) 9 B. & C. 78, and 2 Smith's Leading Cases 212, where all the authorities on this point are collected.
(*g*) Morton's Dec. 344. (*h*) Morton's Dec. 342.
(*i*) 4 B. & Ald. 268. (*k*) 1 Q. B. Rep. 498.

1851-2.

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND

ney (*a*). *Stephen* "On Pleading," p. 332 (5th edit.). That the objection that the parties were Hindoos could not be now raised, as it was not contained in the points intended to be made upon the argument upon the demurrer to the replication, *Arbouin* v. *Anderson* (*b*), *Stephen* "On Pleading," p. 154, 2 *Smoult & Ryan's* Rules & Orders, p. 69, were severally cited.

Judgment was reserved, and now delivered by

12th Dec., 1853.

Sir JOHN JERVIS:

This is an appeal from a judgment pronounced for the Respondent by the Supreme Court of *Bombay*, upon a demurrer to the rejoinder.

The plaint is in the ordinary form in trover, and describes the Plaintiff and Defendants to be Hindoos, and the Defendants to be merchants trading in *Bombay*.

The Defendants pleaded the English Statute of Limitations, 21 *James* I., c. 16, in the ordinary form.

The Plaintiff replied that, during the period of prescription, she had resided in parts without the territories of the East India Company, and without the jurisdiction of the Court.

The Defendant, the present Respondent, (the other Defendant died before replication,) rejoined, that the Plaintiff had, during the period aforesaid, carried on trade in *Bombay* by an agent, and that the goods, at the time of the alleged conversion, were in *Bombay*, and were the goods of the Plaintiff's *Bombay* firm.

The Plaintiff demurred to this rejoinder, and after argument the demurrer was overruled, and judgment pronounced for the Defendant.

By the notes of Chief Justice *Perry*, of the reasons for overruling the demurrer, it appears, that the only

(*a*) 2 Cromp & Mee. 226; S. C. 4 Tyr. 2. (*b*). 1 Q. B Rep. 498

1851-2.

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND.

question argued before the Court was the validity of the rejoinder.

The questions raised during the argument before this Committee were,

First. Whether the English Statute of Limitations, 21 *James* I., c. 16, applies to those parts of *India* which are subject to the government of the East India Company:

Second. If the Statute does apply, whether, as it appears by the record that the parties are Hindoos, the plea of the Statute of Limitations is a good plea.

Third. Whether the replication sets forth matter which shows the Plaintiff to have resided, during the period of limitation, in parts "beyond the seas," within the meaning of the saving in the 7th section of the Statute.

Fourth. Whether the rejoinder presents an answer in law to the replication.

During the argument of the objection to the plea, upon the ground of its being inadmissible in a suit between Hindoos, a doubt was suggested whether the fact that the parties are Hindoos, sufficiently appears upon the record to give rise to the objection. Upon consideration, the Committee is satisfied that the fact does sufficiently appear.

The Charter, which applies to the Court of *Bombay*, requires that regard should be had to the religion, manners, and usages of the natives of *India*, in the issuing and execution of process, and, therefore, to enable the proper process and service to be adopted, the plaint which precedes the process is required to state if the parties are Mahomedans or Gentoos, and, in practice, the allegation in the plaint is regarded throughout the cause as a sufficient averment of the fact for all judicial purposes.

It does not appear that any objection was urged in the Court below upon this point, which is satisfactorily accounted for, by the notoriety of the practice, to the effect stated.

The first point to be considered is, whether the parts of *India*, under the government of the East India Company, are subject to the application of the Statute, 21 *James* I., c. 16?

This question appears to have arisen in the year 1811, in the case of *Williams* v. *Jones* (13 East, 439), but no judgment was then pronounced upon it. In that case, the cause of action had arisen in *India*. The action was commenced in the Court of King's Bench, and the Defendant pleaded the Statute of Limitations, to which the Plaintiff replied the Statute of 4 *Anne*, c. 16, s. 19, that when the causes of action accrued, and since, until within six years of the commencement of the action, the Defendant was beyond seas. The Defendant rejoined, and pleaded the existence of the Supreme Court at *Calcutta*, as established by the Charter, under the 13 *Geo.* III., c. 63, having a like jurisdiction as the Judges of the Court of King's Bench, within *Great Britain*, and that at the time and more than six years after the cause of action accrued, both Plaintiff and Defendant resided within the jurisdiction of that Court, and were subject thereto, and that no action had been commenced. Upon the part of the Plaintiff, it was contended that, by the very terms of the Statute, it could not apply to *India*, as the exceptions in favour of parties being beyond seas could not apply to *India*, the seas meant in the Statute, being the four seas of *England*, and further, that even if the Statute did extend to *India*, either without the exception or with a different sense to be put upon it, still the jurisdiction of the Court of King's Bench was not excluded.

1851-2.

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND.

The case was decided upon the ground, that at all events the jurisdiction of the Court of King's Bench was not exoluded; and Lord *Ellenborough* said, "Assuming that the Statute and Charter referred to had given jurisdiction to the Indian Courts, and that the Courts had adopted the Statutes of Limitation, still those Statutes could only have the effect of barring the remedy in those Courts, but did not extinguish the right."

The extent of the authority of this case is merely that Lord *Ellenborough* did not express any doubt of the competency of the Courts in *India* to adopt the Statute.

It is abundantly clear, that since 1811 the Statute has been adopted in *India*, and made the foundation of judgments by the Supreme Courts there, and that adoption has been recognised and acted upon by this jurisdiction, in the case of *The East India Company* v. *Oditchurn Paul*, reported in the 5th volume of *Moore's* Ind. App. Cases, p. 43, in which case the Statute was pleaded on the part of the East India Company, whose agents could not but be fully informed whether the Statute was acted upon in the Courts in *India*. The recognition and adoption by this jurisdiction of the plea in that case, is, of course, of the greatest weight upon the present occasion.

The case was an action of assumpsit, brought to recover damages for the breach of a contract, in not delivering a quantity of salt. The East India Company pleaded, among other pleas, that the cause of action did not arise *infra sex annos*. The Plaintiff took issue upon that plea. The cause was afterwards tried before two of the Judges, who, upon the evidence then given, held, that the cause of action did

accrue within six years, and entered the verdict for the Plaintiff, upon the issue joined upon that plea. A motion was afterwards made for a new trial, which was refused, and the East India Company appealed against the rule refusing the new trial, and contended, that the evidence proved the cause of action to have arisen more than six years before the commencement of the action.

No question was raised by the parties during the argument of that case, as to the application of the Statute to *India;* but Lord *Campbell* inquired of the Bar, if the Statute, 21 *James* I., c. 16, extended to *India*, and was answered by the then Attorney-General, of counsel for the East India Company, that it was introduced into *India* previously to the Charter, and that statement was not controverted by the counsel for Respondent, of whom Mr. *Leith* was one, a gentleman long eminent as a practitioner at the Indian Bar, and consequently well acquainted with the practice. The Judicial Committee considered, that the plea of the Statute of Limitations was not in that case entitled to favour, and would have been astute to discover any ground upon which the verdict which had been entered for the Plaintiff (the Respondent) could be supported. But the Committee held, that the facts established that the cause of action had arisen more than six years before the commencement of the action, and made the rule absolute for setting aside the former verdict for the Respondent, and for a new trial; thus upholding the plea against the apparent merits of the case.

This Committee is satisfied that the Statute of Limitations has been adopted and acted upon by the Courts in *India*, and such adoption has been recog-

1851-2

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND.

nised and acted upon by this jurisdiction, and the Committee considers that such application of the Statute ought not now to be questioned, whatever doubts might have originally existed on the subject.

The Statute being applicable to *India*, it becomes necessary to consider, whether a residence in *India*, but out of the territories under the government of the East India Company, is, in legal import, a residence "beyond the seas" within the meaning of the Statute, 21 *James* I., c. 16, sec. 7.

These words "beyond the seas" are of extensive application in the law, many ancient rights being saved by the Common Law to persons "beyond the seas;" it is, therefore, of considerable importance to ascertain what has been deemed to be the legal import and meaning of them, because, if it shall appear that they have long been used, in a sense which may not improperly be called technical, and have been judicially construed to have a certain meaning, and have been adopted by the Legislature in that sense, long prior to the Statute, 21 *James* I., c. 16, the rule of construction of Statutes will require, that the words in the Statute should be construed according to the sense in which they had been so previously used, although that sense may vary from the strict literal meaning of them.

The Statute, 21 *James* I., c. 16, was the first Statute which limited the period in which personal actions should be brought, but that Statute seems to be strictly in *pari materia* with the 32 *Henry* VIII., c. 2, which limited the period during which real actions should be brought, and also with other Statutes, which may be called Statutes of Limitation, such as the Statute of Fines, which limited the period

for making entry and taking proceedings to avoid fines. The object of the provisions in all the Statutes referred to is the same, that is, to give effect to the maxim, "*Interest reipublicæ ut sit finis litium.*"

The words "beyond the seas," as before stated, were well known to the Common Law, before the enactment of any Statute containing those words; as in the case where a descent was cast after a disseizin, the entry of the disseizor was tolled, unless the disseizee was beyond the seas; and relief from forfeiture, by default, of copyholds, is, in many cases, allowed by reason of the defaulters having been beyond the seas, as in *Underhill* v. *Kelsey* (3 Cro. Jac. 226).

The question, therefore, is, whether the words "out of the realm," or "out of the lands," or "out of the territories," are synonymous, in legal import, with the words "beyond the seas." To arrive at a correct conclusion, it will be necessary to refer to the various Statutes and authorities.

The first Statute, relevant to this subject, is the Statute, *De donis*, 13 *Edw.* I., which enacted, that fines in certain cases should be void, and that neither heirs or reversioners need make any claim, though they should be within *England*. This enactment seems to have referred to the law of "Continuall Claime," which was subject to a saving in favour of persons "beyond the seas."

The Statute, 18 *Edw.* I., Stat. 4, makes fines binding upon all parties and privies "within the four seas."

Littleton, in section 441, treats of the law before the Statute of Non-claim, 34 *Edw.* III., c. 16, and says, "So it is proved, that if a stranger that hath right unto the tenements, if he were out of the realme at the

1851-2.

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND.

time of the fine levied, &c., shall have no dammage, though that hee made not his claim." And Lord *Coke*, in the Second Inst., p. 337, in reading upon the Statute of 13 *Edw.* I., says, "Hereby it may be gathered (as the law was), that a fine at the Common Law did not bind a stranger that was within age, in prison or beyond the seas." Further, *Littleton*, in chapter vii., on "Continuall Claime," section 439, says, in reference to excuse for "Continuall Claime," "In the same manner it seemeth, that where a man is out of the realme, and the disseizor dieth seized, that such discent shall not hurt the disseizee, but for that hee could not make continuall claime, it seems to them, that when he commeth into *England* he may enter."

It will be observed, that in this section, *Littleton* uses the words, "out of the realme," and "commeth into *England*," in reference to rights which had been preserved to persons who should, in technical language, be "beyond the seas." And Lord *Coke*, in commenting upon this section, (260. b) says, "*Hors du royaulme* (*id est*), *extra regnum*; as much as to say, as out of the power of the King of *England* as of his crowne of *England*; for, if a man be upon the sea of *England*, he is within the kingdom or realme of *England*, and within the ligeance of the King of *England*, as of his crowne of *England*. And yet *altum mare* is out of the jurisdiction of the common law." He afterwards says, "And note, *Littleton* saith not, beyond the sea, or *extra quatuor maria*, for a man *revera* may be *intra quatuor maria*, and yet out of the realme of *England*. But *intra quatuor maria*, or *extra*, is taken by construction to be within the realme of *England*, or the dominions of the same."

In the above statement of the section in *Littleton*,

certain words have been omitted which are in the section, which import that the absence beyond seas should be in the service of the king, but those words are irrelevant and immaterial, as it distinctly appears in subsequent sections and commentaries, and in *Bracton*, lib. 5, fol. 436, referred to by Lord *Coke*, "that the being in the king's service is not a qualification attached to the being beyond seas."

In *Littleton*, section 440, the words "out of the realme" and "within the realme," are used ten times in reference to this saving, by being "beyond the seas," and the comments upon this section, (261. a, 261. b,) which treat at large the proper mode of pleading in reference to this subject, frequently adopt the expression "out of the realme."

It appears to the Committee that these Statutes and commentaries establish, that the words "being out of *England*," "out of the realme," and "beyond the seas," were deemed to be synonymous in legal import; and the several Statutes relating to fines have also a bearing upon the question.

The Statute, 1 *Rich.* III., c. 7, s. 3, binds all parties by the fine, except those "out of this realm of *England*." And in sec. 6, actions are saved if brought within five years after come "within this land." The 4 *Hen.* VII., c. 24, refers to persons "out of the realm." The 23 *Eliz.*, c. 3, s. 3, saves writs of error to recover fines to persons "beyond the seas." The 27 *Eliz.*, c. 9, s. 3, on the same point. The saving is also to persons "beyond the seas." There is a material case reported in *Fitzherbert's* Abr. under the title of "Continuall Claime et non Claime," and which is cited in *Stowel* v. *Lord Zouch* (1 Plowden, 376). *Fitzherbert* is, of course, of

1851-2.

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND.

the highest authority, and Lord *Ellenborough* said, that no better authority than *Plowden* could be cited. The case is thus stated. In the 8th *Rich.* II., a party pleaded in bar a fine, levied before the Statute of Non-claim, and alleged, that the Plaintiff was, a year and a day after the fine levied, within the four seas, and did not claim. The Plaintiff replied, that he was at that time in *Scotland* the whole year and a day, without that he was in *England*. And it was held, that *Scotland* being another land and another realm by itself, the replication was sufficient.

The right of entry of a disseizee, in the absence of continual claim, being by the Common Law saved by an absence "beyond the seas," this case shows, that *Scoland*, being out of the realm, was within the saving being "beyond the seas." Further, the case itself referred to a saving in a Statute expressed in the words "beyond the seas." But *Fitzherbert*, by reporting the case under the head of "Continuall Claime et non Claime," evidently meant, that a residence in *Scotland* would also be within a Common Law saving expressed in the same words.

Lord *Coke's* Commentaries, 260. a and 260. b, upon *Littleton*, sec. 439 and 440, will be found quite confirmatory of the principle of the decision before mentioned.

The Statute of the 32 *Hen.* VIII., c. 2, is immediately in connection with the 21 *James* I., c. 16. That Statute first required, that all real actions should be brought within a definite number of years by all persons within the realm, and saved the remedies to other persons within certain periods after coming within the realm, and it was correctly asserted by *Wedderburn*, of counsel in the case of *King* v.

Walker, hereafter mentioned, that Sir *Robert Brooke*, a very high authority, in his learned readings upon this Statute, always considered and used the words "out of the realm" as synonymous with the words "beyond the seas." The passage referred to in *Brooke* will be found in the seventh lecture, page 121, and in the eighth lecture, pages 121 and 123.

In section 2 of the Statute, 21 *James* I., c. 16, it is enacted, that if any person being entitled to writs in real actions, &c., shall be "beyond the seas," then such persons' rights are saved to them for ten years after coming into this realm, and in section 7, it is enacted, that if persons entitled to bring personal actions shall, when the cause of action accrues, be "beyond the seas," then such persons may sue within the limited period, after they shall have returned from "beyond the seas."

The Statute, 4 *Anne*, c. 16, saves the right of certain actions in reference to the words "beyond the seas."

There are two decisions upon the Statute of 21 *James* I., c. 16, to which it is necessary to advert.

The case of *King* v. *Walker* (1 W. Bla. 286), in which to an action of assumpsit the Defendant pleaded, *non assumpsit infra sex annos*. The Plaintiff replied, that he had been resident in foreign parts out of the kingdom of *England*, to wit, at *Glasgow*, in *Scotland*. The Defendant demurred. The Court held the replication bad, upon the ground, that by the Act of Union, *Scotland* became part of the realm of *Great Britain*, and was no longer "beyond the seas," which words were satisfied only, by a party being beyond what constitutes the realm for the time being. *Wedderburn*, in support of this replication said, that

1851-2.

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND.

persons out of the jurisdiction of the Courts of the country, though not literally "beyond the seas," or out of the King's subjection, were yet within the saving of the Statute, and referred to *Brooke's* reading before mentioned; but *Dennison*, Justice, said, this is a new experiment, and that the Statutes of Limitation of *James* and *Anne* were both express, that the party to be excused must be "beyond the seas," and that he did not understand what the replication meant, by "foreign parts," and that the party must be "beyond the seas," which was the old and true expression; and added, that "before the Union, *England* was an island of itself; since the Union, *Scotland* is made part of it." From the observations of *Wilmot*, Justice, it would seem that the word "*Island*" is stated by mistake of the reporter, instead of kingdom. *Wilmot*, Justice, said, "There is no such kingdom as *England* now. Plaintiff, therefore, while in *Scotland*, was not out of the realm. Besides, that is not now the phrase: the Legislature, by altering it to beyond the seas, at such a critical juncture, seems to have pointed at this very case of dwelling in *Scotland*."

The alteration here spoken of, perhaps referred to the adoption of the words "beyond the seas" in this Statute, while the words in 32 *Hen.* VIII., c. 2, were "out of the realm."

The experiment referred to by Mr. Justice *Dennison* was the attempt to make the words, "out of the jurisdiction of the Court," synonymous with the words "beyond the seas."

The substance of the determination is, that the words "beyond the seas," within the meaning of the saving clause, could only be satisfied by the party being out of what should constitute the realm, for the

time being, and that *Scotland*, at the time of the plea being part of the realm, was, therefore, not within the saving.

The decision so understood is consistent with, and to the same effect as, the case reported in *Fitzherbert*, and cited in *Plowden*, and with the doctrine stated in Lord *Coke's* Commentaries, 260. b; inasmuch as in the time of *Richard* II., *Scotland* was "out of the realm," and, therefore, might be well deemed to be "beyond the seas," within the Statute; and at the time of the case of *King* v. *Walker*, *Scotland* had become part of the realm of *Great Britain*, and, therefore, had ceased to be "beyond the seas," within the meaning of the Statute. After the Union with *Scotland*, difficulties arose in regard to the effect of writs of *ne exeat regno*, which, while restraining the parties from going out of the realm, permitted them to go to *Scotland*, which was out of the jurisdiction of the Court, and it was deemed necessary to alter the writ and the recognizance, by extending the restraint to *Scotland* by name.

The case of *Lane* v. *Bennett* (1 Mee. & Wels. 70) calls for some remark. The Plaintiff, in answer to a plea of the Statute of Limitations, replied, the residence of the Defendant in *Ireland*. Issue was taken upon the replication, and a verdict found for the Plaintiff. A motion was afterwards made by the Defendant to enter judgment for him, *non obstante veredicto*, upon the ground, that *Ireland* was not now a place beyond the seas within the 4 *Anne*, c. 16, s. 19. The Court discharged that rule upon the authority of a decision by Lord *Holt*, in a case erroneously cited, as the case of *Nightingale* v.

1851-2.

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND.

Adams (1 Show. 91), but the case intended was an *Anonymous* case (1 Show. 61), in which Lord *Holt* is reported to have held upon consideration, upon the Statute of Limitations, 21 *James* I., c. 16, that *Ireland* was "beyond the seas" within the meaning of that Statute. Lord *Abinger*, in delivering judgment in *Lane* v. *Bennett*, entered largely into the question of the legal import of the words "beyond the seas," and referred to many of the Statutes before mentioned, and to *Littleton* and Lord *Coke's* Commentaries as authorities, that the words "beyond the seas" and "out of the realm," had been used as synonymous in legal meaning, but decided that *Ireland* continued to be a place "beyond the seas," notwithstanding the Act of Union. The case of *King* v. *Walker* is mentioned in the judgment by Lord *Abinger*, as a decision negativing that the words "beyond the seas" and "out of the realm" are synonymous, but it may be doubted whether that view of the decision was correct. It would rather seem, as before stated, that the Court held, that the meaning of the expression "beyond the seas" was beyond, or "out of the realm," and that at the time of the replication, *Scotland* was not "out of the realm," and, therefore, not "beyond the seas," and consequently not within the saving. The judgment also referred to a note in *Jenkins's Eight Centuries* Rep. Case 18, that since the Union, a husband while in *Scotland* would not be deemed beyond the seas so as to create the presumption of non access.

In the case of *Battersby* v. *Kirk* (2 Bing. N. C. 584), it was also held, that *Ireland*, for the purpose of that decision, was a place "beyond the seas." The question was, whether goods landed in the *Bristol*

Docks were liable to the dues imposed by the *Bristol* Dock Acts, upon goods imported from parts beyond the seas. The case underwent an elaborate argument upon the effect and construction of several Statutes relating to the trade, navigation, and various other matters connected with *Ireland*, all of which are foreign to this case. The judgment turned entirely upon the construction of those Statutes, and with reference to them, goods from *Ireland* landed in the *Bristol* Docks were deemed to be subject to the dues imposed upon goods imported from parts beyond the seas. That case, therefore, does not seem to have any application to the present case.

The Committee, therefore, are of opinion that the Statute of Limitations must at this time be deemed to be applicable to *India*; and that to construe the 7th section literally would be to withhold the benefit of a saving from *India*, which it was intended by the Legislature should prevail where the Statute was contemplated to operate at all, that is in *England*, and that it would be contrary to reason and justice to hold, that the Legislature should be deemed to have intended that the Statute should become operative in any place where, by a due construction of the 7th section, the saving could not apply.

A necessity that the words "beyond the seas" should be construed literally, would create a great doubt of the correctness of the decisions which hold the Statute to be applicable to *India*, but if those words legally construed will give to *India* all the benefit which the Legislature intended the Statute should bestow, the adoption of the Statute in *India*, in that case, seems to be free from objection, as the policy of the

1851-2.

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND.

Statute seems equally applicable to *India* as to *England*. And, upon a review of the Text books, Statutes and decisions, we are of opinion, that the words of the Statute, 21 *James* I., c. 16, "beyond the seas" are in legal import and effect synonymous with the words "out of the territories" and "out of the realm," and that the replication, therefore, discloses a valid answer to the Defendant's plea.

If the words of the replication are equivalent to the words "beyond the seas," then the Plaintiff is within the express provision of the 7th section, and the Statute would be no bar. It is no answer to say, that the party might sue or be sued during the whole time, by reason of a constructive inhabitancy. That might probably give the Court jurisdiction, but will not prevent the express operation of the 7th section. A Plaintiff may be in *England* for six years, but, nevertheless, if he be in prison when the cause of action arises, during the whole period, he may sue when he comes out of prison, notwithstanding that he might have commenced an action at any moment whilst he was in prison, if he had so thought fit. The words of the 7th section are express, and the Plaintiff is within them.

The case, therefore, as regards this question stands in this predicament, that if the Statute of *James* does not operate in *India*, the plea is bad; and if it does operate, the replication contains a legal answer to it. And, therefore, *quocunque via data*, the appeal upon this point ought to be allowed.

But it has already been stated, that the plea is objected to upon another and distinct ground, namely, that although the Statute of Limitations may be ap-

plicable to *India*, yet that such Statute cannot be pleaded in this cause, in which the Plaintiff and Defendant are Hindoos.

If the recommendation of the Committee, which will be founded upon the opinion before expressed, shall be confirmed and adopted by Her Majesty, the appeal will be allowed irrespective of the objection referred to, but, as that objection has been supported by arguments founded upon the supposed construction of the Charter, and upon an alleged inconsistency in the course of procedure of the Supreme Court with the provisions of the Charter, the Committee have deemed it expedient, with the view of preventing future litigation upon the same question, so far as the expression of its opinion may tend to effect that object, to investigate and consider the merits of the objection more largely than was necessary for the decision of the present case.

The course of procedure in the Supreme Courts necessarily differs from that which prevailed in the Native Courts, and such difference may frequently cause suits to be determined in the Supreme Courts otherwise than the same would have been determined if they had been instituted in the Native Courts; and the question may, therefore, frequently arise, whether such judgments of the Supreme Court ought to be deemed to be inconsistent with the Charter where they are the result, not of the application of any law relating to the "inheritance and succession to lands, rents, and goods, and all matters of contract and dealing" between the parties, but from the difference in the course of procedure only in the respective Courts.

It is necessary, to a due consideration of the question, whether the plea can be allowed consistent with

1851-2.

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND.

the provisions of the Charter, that the objection against the plea should be stated with precision and accuracy, because it should be observed in the outset that the plea does not raise any question relating to "inheritance and succession to lands, rents, and goods, and to all matters of contract and dealing" between the parties; and that the validity of the plea does not depend upon the application of any law or usage relating to any of those matters, but that the validity of the plea depends upon the question, whether the course of practice, or procedure, as it is called, under the authority of which it is pleaded, is consistent with the Charter.

The substance of the objection to the plea seems to be, that a judgment in favour of the Defendant, founded upon the plea of the Statute of Limitations, would be a determination upon the rights in litigation between Gentoos, by virtue of a different law than that by which the same suit would have been determined in a Native Court, if instituted there. And it is conceded that the plea would not have been available in a Native Court.

The merit of this objection depends upon the construction of the Charter, to which it is, therefore, necessary to refer.

The Charter contains four sections, which relate to the question, the 29th, 37th, 38th, 39th.

The 29th section is the governing section upon this point, and is to the following effect, namely, that in suits between Mahomedans or Gentoos, their inheritance or succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined by the laws and usages of the Mahomedans and Gentoos respectively, or by such

laws and usages as the same would have been determined if the suit had been brought in a native Court.

The 37th section requires the Court to frame processes, in criminal as well as in civil suits, and the rules for the execution of such processes, with an especial attention to the religion, manners and usages of the inhabitants, and the circumstances of the country, so far as the same could consist with the due execution of the law and the attainment of justice.

There are two other sections in the Charter (the 38th and 39th), which show that it was not intended that the Charter Court should adopt the course of procedure which prevailed in the Native Courts, but that the suits between Gentoos and between Mahomedans, in such Courts, should be by a course of procedure, to be framed by the Charter Court of itself.

It will be observed, that although the Charter provides that the law, which would be administered in the Native Courts in the specified cases, should also be adopted in the like cases in the new jurisdiction, yet the form of procedure in the Native Court was not to be imported in the new Court, but that the new Court was to frame its own course of procedure, having regard to the law by which its decisions were to be governed in suits between Gentoos and between Mahomedans.

Considering the different rules of evidence, modes of purgation and proof, and the numerous other distinctions, in form and substance, necessarily resulting from the different systems of religion and government applicable to the different Courts, it is obvious, that the forms of procedure in the Native Courts could not

1851-2.

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND.

be imported into the Supreme Court, to be presided over by English Judges; and, accordingly, the duty is imposed upon the Supreme Court to frame rules, orders, and processes, for the conduct and prosecution, in that Court, of the suits referred to. That duty could only be effectually performed by attaching certain consequences, results, or penalties, to the non-observance of, or to a departure from, the ordained rules and course of procedure, some of which consequences might lead to a determination of the suit upon points independent of the merits involved in the cause, or the law applicable to the cause of action, or matters in litigation, and it would be difficult to maintain that a determination of the suit, under such circumstances, would be inconsistent with the Charter.

The Charter, while creating the new Court, provided for two objects. The one object was, that the rights of Gentoos and Mahomedans, in regard to the matters specified in the Charter, should be adjudged in the new jurisdiction, according to the laws by which they would have been determined in a Native Court. The other was, that the course of procedure in the new jurisdiction, by which such law was to be administered, should be consonant with the religious feelings, usages, and manners of the native suitors.

The first object seems to have been attained by placing Gentoo and Mahomedan suitors in the Charter Court in the position in which, by the comity of nations, parties are placed who sue in the Courts of one country, in respect of rights or causes of action which had their origin in a foreign country. In such suits the *lex fori* adjudicates upon the rights and matters in litigation, according to the law of the country where the rights or causes of action arose; and, con-

sistently with that course, the Charter provides, that Gentoos and Mahomedans, who live and conduct their transactions under certain systems of law and government peculiar to them respectively, shall have their rights and causes of action decided upon, in the Supreme Court, by the same law by which they would have been determined in a Native Court.

It was confided to the Court to secure the second object, by establishing rules, orders, and processes for the regulation of causes in the Supreme Court, between Gentoos and between Mahomedans.

Upon the part of the Defendant, it is contended, the plea is valid and warranted by the Charter, notwithstanding that such plea would not have been available if the suit had been instituted in a Native Court.

The arguments in support of the plea are founded upon the legal character of a law of limitation or prescription, and it is insisted, and the Committee are of opinion, correctly insisted, that such legal character of the law of prescription has been so much considered and discussed among writers upon jurisprudence, and has been so often the subject of legal decision in the courts of law of this and other countries, that it is no longer subject to doubt and uncertainty. In truth, it has become almost an axiom in jurisprudence, that a law of prescription, or law of limitation, which is meant by that denomination, is a law relating to procedure having reference only to the *lex fori*.

It is said, in *Story's* Conflict of Laws (*a*), in the course of section 579, that "the law of prescription of a particular country, even in a case of contract made

(*a*) Edit. 1841

1851–2.

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND.

in such country, forms no part of the contract itself, but merely acts upon it *ex post facto* in case of a suit, it cannot properly be deemed a right stipulated for, or included in the contract. Even these foreign jurists do not pretend that the prescription of a country, where a contract is made, constitutes a part of the contract."

And, in section 580, in contending against a passage in *Baldus*, he says, "The question is, whether it is a matter of the original merits, as, for example, a question of the original validity, or interpretation, or discharge of a contract, or whether it is a matter touching the time and mode of remedial justice, which is provided by law to redress grievances, or to prevent wrongs, or to suppress vexatious litigation." And, in a subsequent part of the section, he says, "Considered in their true light, Statutes of limitation or prescription are ordinarily simple regulations of suits and not of rights. They regulate the times in which rights may be asserted in Courts of Justice, and do not purport to act upon those rights." And then he adds, "*Pothier* very properly treats prescription, not so much as an extinguishment of the debt or claim, as an extinguishment of the right of action therein. And this is precisely the manner in which the subject is contemplated at the common law, as well as by many foreign jurists."

Consistently with this view, while the Courts of almost all civilised countries entertain causes of action which have originated in a foreign country, and adjudicate upon them according to the law of the country in which they arose, yet such Courts respectively proceed according to the prescription of the country in which it exercises its jurisdiction.

1851-2.

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND.

In section 576 of *Story's* Conflict of Laws, the law is thus succinctly expressed: "In regard to Statutes of limitation or prescription of suits, there is no doubt that they are strictly questions affecting the remedy, and not questions upon the merits. They go *ad litis ordinationem*, and not *ad litis decisionem*, in a just juridical sense. The object of them is to fix certain periods, within which all suits shall be brought in the Courts of a State, whether they are brought by or against subjects, or by or against foreigners. And there can be no just reason, and no sound policy, in allowing higher or more extensive privileges to foreigners, than are allowed to subjects. Laws, thus limiting suits, are founded in the noblest policy."

Then follow many important observations, showing the wisdom and justice of the law of prescription, but which will not aid in the investigation of the question under consideration.

In section 577, Mr. Justice *Story* proceeds, "It has accordingly become a formulary in international jurisprudence, that all suits must be brought within the period prescribed by the local law of the country where the suit is brought, (*lex fori*,) otherwise the suits will be barred; and this rule is as fully recognised in foreign jurisprudence as it is in the common law. Not, indeed, that there are no diversities of opinion upon this subject; but the doctrine is established by a decisive current of well-considered authorities." The author then quotes numerous foreign writers on jurisprudence, in confirmation of the law as stated in the text. The author also refers to several cases, in which the Courts of law of this country have acted in conformity with the principles there stated. A summary of those cases will be found in

1851-2.

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND.

the note to the case of *Mostyn* v. *Fabrigas* (1 *Smith's* Leading Cases, 367), and the case of *Huber* v. *Steiner* there mentioned, and reported in 2 Bing. N. C. 202, is a leading authority upon the subject.

There are two cases which mark distinctly the application of the law as stated in *Story*. The case of *The British Linen Company* v. *Drummond*, which was a suit in *England*, upon a contract made in *Scotland*, where the prescription is forty years. The Plaintiffs sued in *England*, where the Defendant pleaded the Statute, 21 *James* I., c. 16, which was held to be a good plea.

Huber v. *Steiner* was a suit in *England*, upon a promissory note made in *France*, where the prescription is shorter than in *England*. The suit was commenced in *England* after the expiration of the French prescription, but within six years. The Defendant pleaded the French prescription, but which was held to be a bad plea.

It appears to the Committee, after much consideration, that the plea is an admissible and valid plea in this suit, and that the allowance of it is alike consistent with the 29th section of the Charter as with the 37th section, the terms of which section have been already stated.

The 37th section of the Charter has been commented upon, as tending to show that no course of procedure in the Charter Court can be valid and consistent with the Charter, which should authorise a judgment in a suit between Gentoos, founded upon any law other than that by which the same suit would have been determined in a native Court; but, on an attentive perusal of that section, it will be found to refer only to process and its execution, and that no

restriction or duty is imposed upon the Supreme Court in regard to the processes and the rules and orders for the execution of them, except that they shall be respectively framed with an especial attention to the religion, manners, and usages of the native inhabitants, and accommodating the same to the circumstances of the country, so far as the same could consist with the due execution of law, and the attainment of substantial justice.

This section is merely auxiliary to the 29th section, and does not extend its effect in relation to the question of the validity of the plea; and, supposing a plea could be held to be included in the word "process," there is no ground for saying that it is inconsistent or repugnant to any part of, or any matter contained in, this section.

The fallacy which is imputed to the argument against the plea, is, that it confounds a determination of the suit, with the determination of the right or cause of action in litigation in the suit; whereas it is said, that a judgment for the Defendant upon this plea will be no determination founded upon any law relating to the rights or merits involved in the cause of action, the judgment will be consequential upon what may be deemed to be in default, on the part of the Plaintiff in the proceedings in the *lex fori*. The Supreme Court was to frame a course of procedure, and it would be incident to that duty to enforce conformity to such course by attaching certain consequences to default, departure, or disobedience. The time for appearing, for declaring, for pleading, and for taking the several steps in the cause, and the forms of the several proceedings, would all be within the province of the Court to prescribe, and consequently within its

1851-2.

HER HIGHNESS RUCKMABOYE v. LULLOOBHOY MOTTICHUND.

authority to give a judgment for Plaintiff or Defendant, as the penalty for defaults, disobedience, or departures from the prescribed rules. The Court could not exercise its jurisdiction effectually without such a power.

It may be asked, would the Charter be contravened by a judgment upon a demurrer for imperfect pleading, or a judgment of *non pros* for not declaring, or a judgment by default for not pleading, applying, &c.? in each of which cases, unless the practice of the Charter Court should be in exact conformity with the Native Court, the suit would be determined by a law other than that by which it would have been determined in a Native Court; but that the Charter would be thereby contravened, it seems difficult to maintain. A judgment for the Defendant upon the plea that the action was not commenced in due time, seems of the same character as the judgments for default, or departure, before referred to.

The Charter meddles not with a course of procedure in the Supreme Court, or its consequences, which shall not be inconsistent with the native laws relating to the contract, trade, or dealing, out of which the litigation may arise, and which shall not be repugnant to, or in violation of, the religion, manners, and usages of the natives. The determination of the Supreme Court upon the rights arising out of contracts, tradings, or dealings, and their incidents, must be consonant with the law, religion, manners, and usages of the Gentoos, but the allowance of this plea will not constitute a determination relative to any right arising out of the contract, or dealing, to which the cause of action refers, and the course of procedure by which the plea is allowed is not otherwise than consonant

to the religion, manners, and usages of the litigant parties.

It remains only to repeat the opinion of the Committee, that the judgment pronounced in the Supreme Court ought to be reversed, that the appeal should be allowed, and the cause be remitted.

JOHN ROBERT DOUGLAS - - *Appellant*,

AND

THE COLLECTOR OF BENARES, SHEIKH GHOLAM AHMUD and LADO BEGUM - - - - } *Respondents.**

On appeal from the Sudder Dewanny Adawlut at Allahabad.

11th Dec., 1851.

IN this case, the Appellant brought an action in the Court of the principal *Sudder Amin* of the city of

A. purchased certain villages in the name of his son, B. A. being indebted to C. executed a mortgage bond, and deposited the title deeds of these villages with C. as security for the debt. C. afterwards sued A. for recovery of the mortgage debt, and ultimately obtained a decree in his favour. Pending this suit A. died, and was succeeded by B. his heir, against whom the suit was revived. B. became a defaulter to Government, when the Government authorities seized the villages, and took steps for bringing them to sale to satisfy the Government demands. C. informed the Government officer of his claim, and petitioned to have the sale stayed, but the Collector sold the villages as the property of B., suppressing the notice of the equitable charge of C. upon the villages. C. then sued B., the Collector, and the auction purchasers, claiming to be entitled to the sale proceeds of the villages in the hands of the Government, in satisfaction of his mortgage debt. The *Sudder Dewanny* Court dismissed the claim of the Plaintiff on the ground, that the decree made in the suit against A. was

* Present: Members of the *Judicial Committee*,—The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.

1851.

DOUGLAS v. THE COLLECTOR OF BENARES.

Benares, as attorney for the Government (acting as executors of the Will of *Baboo Jykishen Das*, deceased), against the Collector of *Benares*, and *Rai Ram Kishen* and *Rai Sri Kishen*, sons of *Putni Mull*, the auction purchaser of the village of *Lehurtara*; *Baboo Deep Narain Sing* and *Raja Ishree Persad Narain Sing*, heirs of *Raja Oodit Narain Sing*, in possession of the village of *Cheetoopoora* and of a fourth share in *Jaitpoora*; *Sheikh Gholam Ahmud*, son of *Sheikh Shookr-oollah*, deceased, and *Mussumat Lado Begum*, the widow of *Sheikh Shookr-oollah*, as Defendants, to recover the sum of Rs. 99,200, consisting of the following particulars:—Rs. 31,000, the proceeds of sale of *mouza Lehurtara*; Rs. 15,100, the proceeds of sale of *mouza Cheetoopoora*; and Rs. 3500, the proceeds of sale of a fourth share in *mouza Jaitpoora*, together with interest thereon, from the dates of sale, namely, on Rs. 31,000, from the 3rd of *November*, 1826, and on Rs. 18,600, from the 12th of

against the effects of A., and only applied to such property as B. was in possession of at that time; that as it had been sold to realise the demands of Government, the decree did not apply to the villages.

Such judgment on appeal reversed, the Judicial Committee holding:—

First. That the suit was properly instituted for recovery of the sale proceeds in possession of Government, as the decree obtained by C. against B. operated as a conversion of the estate of A., making it assets in B's hands, which C. had a right to follow.

Secondly. That, as the Government had notice of C.'s equitable charge upon the villages, and suppressed that fact at the auction sale to the purchasers, there was a clear equity in C. to call upon the Government for payment out of the auction proceeds received by them, and an account directed of the amount received by the Collector from the sale of the villages with interest, so far as the amount received would extend to the payment of his mortgage debt.

Semble. Where property is sold by Government for general debts, and not for arrears of revenue, they sell only the interest of the debtor, and do not guarantee the vendee a title.

The permission under sec. 5 of Ben. Reg. IV. of 1793, to a Defendant to file a supplemental answer, does not entitle him to make a new case, or raise a fresh issue, in contradiction of his former defence.

By sec. 10 of Ben. Reg. XXVI. of 1814, the *Sudder Amin* is bound to record a proceeding specifying the points at issue, and to call for evidence for and against the claim.

February, 1827. As the interest exceeded the principal, the claim was limited to a sum equal to the principal, and amounted to the sum of Rs. 99,200, the amount sued for. The Plaintiff claimed this sum on behalf of the Government, who were the executors of one *Jykishen Das*, an equitable mortgagee under a mortgage bond and deposit of title deeds from *Sheikh Shookr-oollah*, deceased. The case of the Collector of *Benares* and the other Defendants, the auction purchasers, was, that the villages in question were the property of *Sheikh Gholam Ahmud*, and had been sold for arrears due by him to Government under a farming lease.

The history of the proceedings and the pleadings are fully set out in the judgment.

The appeal was argued by

Mr. *Stuart*, Q. C., Mr. *Forsyth*, and Mr *Maule*, for the Appellant; and

Mr. *Wigram*, Q C., Mr. *Lloyd*, Q. C., and Mr. *Edmund F. Moore*, for the Respondents.

The questions made were:—

First. To whom the villages in question belonged at the time of the mortgage bond and deposit of the title deeds; whether they were the property of *Sheikh Shookr-oollah*, or his son, *Sheikh Gholam Ahmud*, in whose name they had been purchased.

Second. Assuming the villages to have been the property of *Sheikh Shookr-oollah*, and made the subject of equitable mortgage by him, yet that in such case the only beneficial interest which *Sheikh Gholam Ahmud* had in the villages at his father's death, was a right to so much of the proceeds of the sale of the property as might remain, after satisfying the debt

1851.

DOUGLAS v. THE COLLECTOR OF BENARES.

due under the mortgage to *Jykishen Das*, and that, therefore, the Government had no right to sell the villages, as the property of *Sheikh Gholam Ahmud*, without acquainting the auction purchasers of the lien.

Third. Whether, if the Plaintiff's claim as representing the mortgagee was well founded, the suit was properly framed for recovery of the mortgage debt, by treating the sale as a conversion, or should not have been brought against the auction purchasers for recovery and possession of the villages. And further, whether, as the sale of the villages took place without any attachment having been issued in the suit in which the mortgagee sought to recover the mortgage debt, any claim could be sustained against the Government in respect of the purchase-money..

Fourth. Whether the claim was not barred by the Ben. Regs. of Limitation, III. of 1793, sec. 14, and VII. of 1795, sec. 8.

And lastly, upon the admission of the Court, under sec. 5, Ben. Reg. IV. of 1793, of a supplemental answer, after rejoinder making a new case, which was contended by the Appellant to be irregular and contrary to the practice of Courts of Equity in *England*.

The following Regulations and authorities were referred to:—

To show that a sale in *India* by the Government, of a defaulter's lands, was not a proceeding *in rem*, and that the Government did not take upon itself to guarantee a title to the purchaser, *Marshman* (*a*), p. 868-9; Act, No. 1, of 1845, sec. 20 (*b*); and Ben. Regs. I. of 1793, sec. 7; and XI. of 1822, sec. 29: and, as the course a claimant to lands of a defaulter, about to be

(*a*) Guide to the Civil Law of the Presidency of Fort William.
(*b*) Acts of the Leg. Coun. of India, by Theobald, p. 754.

1851.

DOUGLAS v. THE COLLECTOR OF BENARES.

sold by Government, ought to pursue, *The Vakeel of Government* v. *Mussummaut Kishore* (*a*), Ben. Reg. VII. of 1825, sec. 4, cl. 5.

Judgment was reserved, and now delivered by

5th Feb., 1852.

The Right Hon. T. PEMBERTON LEIGH:

In the month of *September*, 1811, *Sheikh Shookr-oollah* had transactions in business with a mercantile firm, of which *Jykishen Das* was the representative, and he became indebted to the firm on a balance of accounts. He was, or represented himself to be, the owner of two villages, and a fourth share in another village, purchased with his own funds, in the name of his son, *Gholam Ahmud*. The property appears to have been held under a grant, at a light rent (called a *Maafee sunud*) from *Raja Bulwunt Sing* to *Gholam Ahmud*.

On the 4th of *September*, 1811, *Shookr-oollah* handed over to *Jykishen Das*, as a security for the balance then due to him, the *Maafee sunud*, under which the property was held, with two other papers relating to it, the particulars of which are not stated, and granted a mortgage bond, which, after stating the balance due, was in these terms:—"In consideration of the said sum [Rs. 23,645. 2a.], I pledge the villages of *Lehurtara*, *Cheetoopoora*, and a fourth share in *Jaitpoora*, purchased with my own funds, in the name of my son, *Gholam Ahmud*, together with three papers; viz. one a *Maafee sunud*, bearing the signature of *Raja Bulwunt Sing*, and two others, viz. one an original deed, and the other a copy, till the sum be paid. I promise to pay the said sum in three years, when I shall receive back the papers. Should the term expire and the debt not be paid, then I will

(*a*) 2 Ben Sud. Dew Rep. 162.

1851.

DOUGLAS v. THE COLLECTOR OF BENARES.

mortgage or sell the said villages elsewhere, and pay the money due to the house."

The debt not having been paid at the prescribed period (three years from the date of the security), *Jykishen Das* took possession of the mortgaged property, and remained for several years in possession.

On the 21st of *July*, 1819, a large balance remaining due to him, he filed a plaint in the Provincial Court of *Benares*, the terms of which are not in evidence, but from the final decree made in the suit, it appears that the Plaintiff set forth his bond, alleging that the debt remained unpaid, and sought justice. It would seem, therefore, to have been a prayer for what, in a Court of Equity in *England*, would be called general relief, or such relief as the circumstances established at the hearing might, in the opinion of the Court, entitle the Plaintiff to call for. That relief would be, if the case were established, a personal decree against *Shookr-oollah*, if alive, or against his assets if he were dead, and a sale or mortgage of the specific property pledged to satisfy the demand.

To this plaint, *Shookr-oollah* put in an answer, not suggesting that the property in question belonged to his son, but denying the bond and the debt to the Plaintiff; admitting that he had deposited with the Plaintiff the title deeds of the property, but alleging that the deposit had been made by way of suretyship for a third person, from whom nothing was due to the Plaintiff.

Now, it must be admitted, that the answer of *Shookr-oollah* would be no evidence against *Gholam Ahmud*, unless it had, in fact, been put in, as the Plaintiff in his replication alleges, by *Gholam Ahmud* himself, under his father's seal; but of this there is no evi-

dence. However, after an answer had been put in, and before replication, *Shookr-oollah* died, leaving *Gholam Ahmud*, his son and heir, and as such his representative in the suit; and by the proceedings recited in the decree, it appears that on a petition being filed by the Plaintiff, representing that the Defendant had died, and praying that a notification might issue, calling on his son *Gholam Ahmud* to appear, an order for the issue of this notification was passed on the 16th of *May*, 1821.

Gholam Ahmud, therefore, at that time, if not sooner, had plainly notice of the suit; he became a party competent to assert all rights which he had, either in his individual or representative capacity. According to the practice of Courts of Equity in *England*, he ought to have been originally a party, as having, what we should term, the legal estate; but if there was any informality in not making him a party at first, all substantial objection was removed when he was brought before the Court, at a period of the suit which enabled him to bring forward any claim which he had.

Seeing the answer which had been put in by his father, which answer dealt with the property as belonging to the father, the son makes no complaint of it; and when a replication is filed, respecting the Plaintiff's title, a rejoinder was called for, and we presume filed, but no title appears at any time to have been set up by *Gholam Ahmud* in himself.

The cause did not come on for hearing until the 12th of *August*, 1825, when this bond appearing to have been executed on an insufficient stamp, the Judge of the Provincial Court, instead of giving the Plaintiff an opportunity of applying to the revenue officers to affix the proper stamp, which was afterwards done; or proceeding, as he was pressed to do,

1851.

DOUGLAS v. THE COLLECTOR OF BENARES.

to take evidence of the debt due, which, with the deposit deeds, might have established the Plaintiff's demand, very improperly dismissed the suit with costs.

Against this decree an appeal was, with great reason, brought to the *Sudder Adawlut* at *Allahabad;* the precise period does not appear, but we collect, from what afterwards took place, that the appeal must have been lodged very shortly after the decree.

The cause came before the *Sudder* Court, on the 10th of *December*, 1828, when the Court directed inquiries to be made and evidence to be taken with reference to the accounts and the facts of the case, independently of the bond, which, for want of a proper stamp, could not be received in evidence; a great many witnesses were examined, and much evidence was taken, and on the 11th of *February*, 1835, the cause came on for hearing before Mr. *Colvin*, one of the Judges of the *Sudder* Court.

Amongst other evidence then produced, was an *amal-dastak*, from *Gholam Ahmud*, to the tenants of the estate, directing them to pay their rents to the Plaintiff, the mortgagee. Is it possible that there could be stronger evidence in favour of the Plaintiff's claim under the mortgage, or more conclusive proof that *Gholam Ahmud* could set up no title in himself in opposition to it?

Mr. *Colvin* was of opinion, most properly, that the decree of the Court of *Benares* should be reversed, and stated his view of the case in these terms:—

"Although the bond has not been executed on a stamp of Rs. 8, as required by Regulation VII. of 1800, but has been written on a stamp of only eight anas, and is, consequently, inadmissible in a Court of justice; but the claim of Plaintiff (Appellant) was brought into Court under the ledger accounts, as well

as under the bond, and from the evidence of the witnesses, the report of the treasurer, and the translator of the account books, elicited in the inquiry, as far as it has been prosecuted, in pursuance of the order of the *Sudder Dewanny Adawlut*, of *Calcutta*, dated the 10th of *December*, 1828, viewed in connection with the answer to the plaint filed by Respondent's ancestor, in which he acknowledges that he was security to the house for *Meer Ussud Ali*, the *Tahsildar;* that he delivered the title deeds to Plaintiff for his satisfaction; that the *amal-dastak* was drawn out in Plaintiff's name by *Sheikh Gholam Ahmud*, his son; and from a reference to the *amal-dastak* bearing Respondent's seal, which has been filed by Appellant, the claim of Plaintiff (Appellant) under the ledger account, of the fidelity of which there is not the least doubt, is fully proved and established in my opinion to the satisfaction of the Court; under these circumstances, the claim and appeal of Appellant should be decided in his favour, and the decision of the Provincial Court should be set aside; and with this view of the case, no further inquiry is deemed necessary."

The Judge here relies upon the deposit of the deeds and the *amal-dastak* as part of the evidence establishing the Plaintiff's demand. Now, unless the demand was against the particular estate, the deposit and the *amal-dastak* were of no importance; he, therefore, manifestly considered the claim as established against the property.

As the decree of the inferior Court was to be reversed, it became necessary that the case should be laid before another Judge of the *Sudder* Court; and, accordingly, in the end of *March*, 1835, the case came before Mr. *Turnbull*, who directed application to be

1851.

DOUGLAS v. THE COLLECTOR OF BENARES.

made by the Plaintiff to the revenue authorities to have the defect in the stamp on the mortgage bond remedied. This was done, and the application having been granted, the case was brought again before Mr. *Turnbull*, who pronounced his decree on the 15th of *June*, 1835, in these terms:—"According to the reasons in the proceeding of the aforesaid Judge and the papers in the suit, I am also of opinion, that the claim of the Plaintiff has been satisfactorily proved; accordingly, a final decree is passed, that the appeal of Appellant be decreed to him; the decision of the Provincial Court of *Benares*, dated the 12th of *August*, 1825, be reversed and set aside; that the whole of the costs of the two Courts be paid by Respondent; and that, suing out execution of this decree, Plaintiff do recover the amount claimed, with interest thereon, at the rate of one rupee per cent. per mensem, from the date of institution of suit to the date of payment, together with the costs, from the estate and effects of *Sheikh Shookr-oollah*, deceased, the ancestor of Respondent."

It will be observed, that this decree does not direct payment out of the specific property charged, which may, perhaps, be accounted for by circumstances which we shall presently advert to; but that the claim was considered established, and intended to be satisfied out of that property, as part of the assets of *Shookr-oollah*, and as specifically charged, there cannot be the smallest doubt, from the terms of the decree of the two Judges to which we have referred.

The first Judge distinctly states, as proved, the deposit of the title deeds and the *amal-dastak* of *Gholam Ahmud;* and the second Judge adverts to and concurs in the reasons of the first, and receives the

mortgage bond in evidence. It is plain, therefore, that the Plaintiff's case was held to be established, and the mortgaged property treated as the property of *Shookr-oollah*. It would have been extraordinary if it had been otherwise; the only person who could set up an adverse title, *Gholam Ahmud*, had been for thirteen years before the Court a party in the suit, litigating and resisting the Plaintiff's rights, on other grounds, but had never set up what, as regarded the mortgage, would have been a conclusive answer; an adverse title in himself.

Unfortunately, however, in the interval between the dismissal of the suit and the final decree on appeal, transactions had taken place which brought the Plaintiff into conflict with a more formidable antagonist than *Gholam Ahmud* or *Shookr-oollah*, and prevented him from reaping the fruit of his decree.

It seems, that previously to 1825, *Gholam Ahmud* had taken to farm some part of the Government revenue, and in that character had become a defaulter and a debtor to the Government, and the Collector of *Benares* thought fit, in 1825, or early in 1826, to seize the villages, the subject of the Plaintiff's mortgage, and to take steps for bringing them to a sale, in order to satisfy the demand against *Gholam Ahmud*.

The villages having become the property of *Gholam Ahmud*, as heir of his father, subject to his father's debts, would, of course, to the extent of *Gholam Ahmud's* interest, be liable to any demands against him, but in what mode this particular liability to the Government had been created, is a question involved in much obscurity; for two totally different and inconsistent accounts have been given by the Collector, as will presently appear.

1851.

DOUGLAS v. THE COLLECTOR OF BENARES

Jykishen Das hereupon, whose suit had indeed been dismissed in the inferior Court, but who had appealed, or was about to appeal, to the *Sudder* Court, presented (as he alleges, and as we think, for the reasons we shall state, he has sufficiently proved) a memorial to the Collector, stating his claim, and praying that the sale might be stayed. No attention being paid to this memorial, he petitioned the Provincial Court of *Benares* to interfere. Nothing effectual having been done by that Court, the Plaintiff finally applied to the *Sudder* Court of *Calcutta*. At what time the petition was presented does not appear, but it came before the Judge, Mr. *Courtney Smith*, on the 18th of *April*, 1827.

It was not known in *Calcutta* at the time, whether the sale had been actually made or not. In point of fact, the principal portion of the property had been sold in *November*, 1826.

The Judge of the *Sudder* Court, therefore, made this order. "The petition of Appellant, complaining of the Collector's proceedings, touching the sale of certain villages mortgaged to Appellant, and praying that an order may issue, prohibiting the sale, or directing the proceeds of the auction sale to be held in deposit, until a final decision should be passed by this Court, and setting forth other matters; also copies of two proceedings of the Provincial Court of *Benares*, dated respectively the 28th of *April*, 1826, and the 10th of *February* of the current year; also copies of two petitions on the part of *Bhowanideen*, which were filed in this Court, on the 14th of the current, accompanied by the prescribed stamp, and which are numbered 13, 14, 15, 16, and 17, were this day perused. As the sale has taken place, or is about to take place,

for a claim of Government in the *Akbari Mahal*, an order prohibiting the sale, or directing the sale proceeds, which are not in excess of the Government demand, to be held in deposit, cannot issue from the miscellaneous department. If there be a surplus of the sale proceeds, the Provincial Court are competent to issue the necessary orders; there is, consequently, no necessity for an order of this Court. Should the decision of the Provincial Court be eventually reversed, and Appellant's claim be decreed to him by this Court, and Appellant considers that his claim to the lands is stronger than the claim of Government, he will be competent to bring a regular suit against Government."

The learned Judge appears to have thought, and, in our opinion, to have justly thought, that if the Collector, with full notice of the Plaintiff's equitable claim, thought fit to sell the estates as the property of *Gholam Ahmud*, in whose name they were held, without noticing the Plaintiff's claim, the Plaintiff would have a clear equity against the proceeds in the hands of the Collector, if his claim should be ultimately established, and this upon the most obvious principles of moral justice, recognised and acted on as safe grounds of decision by the Court of Chancery in *England*.

When the Plaintiff's claim was ultimately established, he himself was dead, and had made a Will, appointing the Government his executor; his Will was disputed, and it was not until the year 1838 that the Will was established, and on the 5th of *November*, 1838, the plaint in the present suit was filed in the Court of *Benares*.

The suit was instituted against the Collector of *Benares*, as having received the proceeds out of which

1851.

DOUGLAS v. THE COLLECTOR OF BENARES.

the Plaintiff's demand was to be satisfied, against *Gholam Ahmud* and his mother, *Lado Begum* (the widow of *Shookr-oollah*), and against several other Defendants who had purchased the estates at the sale made by the Collector.

The reason for making *Gholam Ahmud's* mother a party was this: The Plaintiff alleged that *Gholam Ahmud*, being required to give security as farmer of the revenue, forged a deed of dower in the name of his father, *Shookr-oollah*, in favour of *Lado Begum*, and that *Lado Begum* and *Gholam Ahmud* then joined in pledging the estates to the Collector, for due payment of anything which might have become due from *Gholam Ahmud*. The plaint taking this view of the Collector's claim, alleged various reasons to show that the pretended deed of dower was fictitious, and that *Lado Begum* never had any claim to the property, and it charged the Collector with having omitted to make the necessary inquiries, and to take proper precautions before he accepted the security. It alleged distinctly the proceedings in the former suit; that application had been made to the Collector to stay the sale till the Plaintiff's claim was formally disposed of; that application had afterwards been made to the Court of *Benares*, and finally to the *Sudder* Court of *Calcutta*, with such effect as we have already stated. The relief sought was to this effect: that although this sale was in every sense open to reversal by a Court of Equity, yet, on consideration that, after the reversal of the sale, the property must still be sold in satisfaction of the claim under the *Sudder* decree, and Plaintiff would receive the proceeds, and that double trouble would be incurred; Plaintiff, therefore, relinquishing his claim for reversal

of sale, and holding that he was entitled to the sale proceeds, on the ground that it was pledged in mortgage for his dues, as declared by the *Sudder* decree, has filed his petition for the claim before mentioned, and prayed for a decree, that, as usual, justice might be obtained by the institution of the suit.

Though the plaint was filed in *November*, 1838, no answer was put in by the Collector till *May*, 1840. Whether he was the same individual who had been engaged in the transactions with *Gholam Ahmud* does not appear. It is to be hoped that he was not; but the transactions referred to had all taken place in his office, and memorials of them were, or ought to have been, found, and he had had abundant time to inform himself of the particulars.

The answer of the Collector began in these words:— "That *Shookr-oollah*, father of *Sheikh Gholam Ahmud*, one of the Defendants, during his lifetime, and, after him, his widow, held possession of the villages in *Maafee*, in the name of *Gholam Ahmud* their son. That *Sheikh Gholam Ahmud* took the farm of the *Akbari Mahal* of *Zillah Benares*, and gave these three villages as security on the part of his mother; and caused a security-bond to be executed by his mother. That mother and son joined interests for their joint profit. That a balance fell due from the *Akbari Mahal*, and the property was sold by auction in 1226 and 1227 *Fusli*, in notification of the balance due to Government, the usual notification having first been issued. That the balance was not liquidated thereby." The answer then stated, that *Shookr-oollah* had other property, and insisted, that in the decree of 1835 no mention is made of these villages.

The statement here is, that the villages, though

1851.

DOUGLAS v. THE COLLECTOR OF BENARES.

held in the name of *Gholam Ahmud*, were, in fact, the property of *Shookr-oollah*, and that the claim of the Government upon them was founded on a deed executed by his widow.

The Defendants, the purchasers, put in distinct answers. *Raja Ishree Persad Narain Sing*, one of them, insisted, that the sales had been publicly made by the Collector, who had received the purchase-money, and given each purchaser a deed of sale and possession, and that each purchaser got possession under his purchase.

The two other purchasers, *Rai Sri Kishen* and *Rai Ram Kishen*, insisted, that the suit was contrary to the practice of the Court. "That Plaintiff does not sue for the reversal of the sale and possession of the villages, for the Plaintiff is clearly satisfied with the sale, and, therefore, he has not sued for its reversal, but to recover from Government the amount proceeds of the auction, which have been paid into the treasury of the *Benares* Collectorate, together with interest thereon." That, under those circumstances, these Defendants were improperly made parties in the suit.

A most conclusive replication to the answer of the Collector was filed by the Plaintiff, on the 26th of *June*, 1840. After showing that the Collector had in truth admitted the Plaintiff's title, it insisted, that if the Collector, when he took the security on these villages, had made due inquiry, or called for the title-deeds, he would not have been misled with respect to the charge upon the property. It then proceeded to refer to the petitions which had been presented to stay the sale, and proposed to produce them in proof. We shall state the passage, because it is most mate-

rial, both with reference to the merits of the case and the extraordinary proceeding afterwards adopted by the Court. "Eighthly. That when it was discovered that *Lado Begum's* security was the consequence of *Gholam Ahmud's* fraudulent conduct, and a petition was filed in the Collector's office, even then the Collector did not abstain from the sale. That Plaintiff will file copy of that petition also. Ninthly. That when the Collector advertised the villages aforesaid for auction sale, then also a petition was filed, and another petition was given in to the Provincial Court. That the order of the Provincial Court was to the effect, that when the time of sale should arrive the necessary order would be given; but, in the *interim*, Plaintiff's suit was dismissed. That Plaintiff again petitioned the Collector, stating, that he had appealed his suit to the *Sudder Dewanny Adawlut*, that his action against the property was pending, that the property was in mortgage, and prayed that it should not be brought to sale. That thereupon the Collector passed an order in effect, that the Plaintiff's suit having been dismissed, no order could issue. That since Plaintiff had, without ceasing, petitioned the Provincial Court and the Collector pleading his regular suit, and complained of the security and *Gholam Ahmud*, it was nowise right that the security should have been accepted, the property sold, and the sale-proceeds of the mortgaged property appropriated; indeed, these acts were beyond the competence of the Collector."

The Plaintiff here refers to petitions presented to the Collector to stay the sale, one before and one after the dismissal of this suit, and to an order made by the Collector upon the latter. These, therefore, were documents in the Collector's own office, and a copy of one of them the Plaintiff offered to file in evidence.

1851.

DOUGLAS v. THE COLLECTOR OF BENARES.

To the answer of the other Defendants the Plaintiff also filed a replication, insisting, that they had either notice of his title, or had purchased without due inquiry.

On the 3rd of *August*, 1840, *Raja Ishree Persad Narain Sing* filed a rejoinder, insisting, that he had no notice, and had been guilty of no laches. And, on the 15th of *August*, 1840, the other purchasers filed a rejoinder, insisting, that the proper course for the Plaintiff to have pursued would have been, if he disputed the sales, to have taken proceedings to reverse them, in which case the purchasers would have obtained back their purchase-money from the Government; but that as the Plaintiff distinctly offered to confirm the sales, he ought to confine his claim to the proceeds, and not to sue the purchasers and the Collector at the same time.

The Plaintiff seems to have felt the force of this reasoning, for, at a subsequent period, he dismissed these Defendants from the suit. The exact date of this proceeding does not appear. We mention it now in order not to embarrass the statement of the case as against the material Defendants.

Had the suit gone to hearing on the issue tendered by the answer of the Collector, there could have been no doubt about the result; but instead of this, the Court took, what appears to us, a very extraordinary course.

On the 4th of *August*, 1840, the suit (in which it is stated, in the proceeding referred to, "the evidence was called for") was brought up in the presence of the *vakeels* of the parties. No rejoinder had been filed by the Government *vakeel*, and as against him, the only material party, the cause seems not to have been at issue.

On this occasion several questions were put by the Court to the Plaintiff's *vakeel*, as to the year in which his client got possession of the mortgaged property, and the year in which he was dispossessed of it, and other matters. We are at a loss to understand the object of these questions. The *vakeel* not being prepared at the moment to answer them, the cause was adjourned for two days.

On the 6th of *August*, accordingly, the cause appears to have come on again, when the Government *vakeel* is said to have represented "that in the answer which he had before given in to the Plaint, many facts relating to the transaction had inadvertently been omitted," and he asked the Court's permission to file a supplemental answer, which was granted by the Court, and on the 2nd of *November*, 1840, the answer having been prepared, an order was made by the Court "that it be filed, and that the cause be again brought up after eight days or more."

The answer which was filed was by no means confined to stating facts relating to the transaction which had been inadvertently omitted. It was in utter contradiction of the statements which had been made in the first answer. Instead of alleging, that the property had belonged to *Shookr-oollah* and his widow, it alleged, that it had never belonged to *Shookr-oollah*, or his widow, but that it was always the property of *Gholam Ahmud;* instead of relying, as before, on a mortgage by the widow and *Gholam Ahmud*, it alleged, that no mortgage of it had been made by either of them, but that *Gholam Ahmud* being the owner of the estates, and indebted to the Government, these villages, as his property, were sold for the debt.

The leave to file a supplemental answer is stated to

1851.

DOUGLAS v. THE COLLECTOR OF BENARES.

have been given under section 5, Reg. IV. of 1793, which is certainly very general in its terms; but it is much to be regretted if the practice of the Court be such as to warrant what has here taken place: if a Defendant, after having put in an answer stating facts, which are within his own knowledge, or which he has the full means of ascertaining, may afterwards, on finding that he has no defence as the case stands, do what the Defendant has here been permitted to do; if he is at liberty, without any affidavit of the circumstances, without any explanation of the nature of the error which has been committed, or in what it has originated, or what is the correction to be made, or what the omission to be supplied, to make a totally new case, and state facts at direct variance with the statement in the first answer, and of course completely change the issue in the cause.

The replication to this answer, after alleging that the course of the Government cancelling and annulling the contents of their first answer was unprecedented, and alleging, as we think very reasonably, that the object of a supplemental answer was to supply what might have been omitted, and not under the designation of a supplemental answer to nullify the first; proceeded to re-state the original case, particularly charging and relying, by the eighth paragraph, on the various proceedings which had taken place by petition to the Collector, and otherwise, to stay the sale pending the Plaintiff's appeal from the decree of 1825.

To this replication, the date of which does not appear, the Government filed a rejoinder on the 28th of *January*, 1841. At this time, at least, the papers in the office had been examined; but so far from

there being the slightest denial of the facts alleged by the Plaintiff with respect to the applications to stay the sale, the replication alleges in so many words, that the statement on that subject is favourable to the cause of Government; for the *Sudder* Court, notwithstanding that a petition was filed praying for a postponement, would not interfere in the demands of the Government.

Now, we find by the 5th section of the Regulation before referred to, that the Defendant in his rejoinder is simply to deny the truth of the reply of the Plaintiff, or the parts of it which he means to dispute. Here, so far from denying those facts, the Defendant founds his defence upon them, and we must treat them as admitted. It is a mistake to assimilate (as was done at the hearing) these proceedings to the practice in the Court of Chancery in *England* There the Plaintiff has the means of compelling a distinct answer, "yes" or "no," to any allegation which he makes, and, therefore, it is not sufficient for him to say such or such a fact is not denied by the answer, he must read an admission of it. The proceedings in the Indian Courts are of a totally different character.

The cause being now at issue was again brought before the Court, on the 30th of *January*, 1841, when it should seem, that, according to Regulation XXVI. of 1814, sec. 10, the Judge ought, after putting such questions as he thought necessary to the *vakeels*, to have pointed out to the parties the facts material to be proved, and called for evidence upon them; but instead of this, various questions having been put to the Plaintiff and his *vakeel*, and the answers taken down, the bearing or importance of which we do not understand, the

1851.

DOUGLAS v. THE COLLECTOR OF BENARES.

case was adjourned. On the 26th of *April*, 1841, it came on once more, when, it is stated, the Record was inspected, and without taking evidence, or, as far as appears hearing the parties, the Judge thought fit to dismiss the suit, assigning as one reason, a fact of which not only there is not a shadow of proof, but which is directly contradicted by the whole evidence of the transactions, namely, that the villages had been purchased with the funds of *Sheikh Gholam Ahmud*, and had, therefore, been properly sold for payment of his debt to Government.

We are quite at a loss to comprehend the course which the Judge took upon this occasion, or to reconcile it with any view of law or of justice.

The course which the Plaintiff insisted ought to have been taken, is very distinctly pointed out in his petition of appeal to the *Sudder* Court of *Allahabad*, namely, that after the four pleadings had been filed, it behoved the principal *Sudder Amin*, in accordance with the provisions of section 10, Reg. XXVI. of 1814, to have recorded a proceeding specifying the point or points to be established, and calling for evidence for and against the claim, with reference to the purport of the plaint and answer, from the parties respectively, in order that each of the parties might file his evidence for or against the claim, from which full investigation might be had, and the merits of the case fully developed. He concluded his petition of appeal in these terms—"That the Collector, in his supplemental answer, asserts that the property sold by auction was purchased with the funds of *Gholam Ahmud;* and the principal *Sudder Amin* also declares, that the property was purchased by *Gholam Ahmud;* now, Plaintiff (Appellant) consents to rest his whole case on

this one point; that if, from the record of the case, the deeds of sale, and the papers in the Collectorate, it shall appear that the property was purchased with the funds of *Gholam Ahmud*, then Plaintiff consents that it shall be excepted from his claim; otherwise, on the simple proof of it being the property of *Sheikh Shookr-oollah*, Plaintiff is entitled to a decree on the ground of Plaintiff's claim being entitled to a preference with reference to the claim of Government. On the above grounds, therefore, Plaintiff (Appellant) prays that the decision of the principal *Sudder Amin* be reversed, and his claim be decreed as justice requires." He added to this petition, as an exhibit, the decree of 1835.

This petition appears to have come before Mr. *Tayler*, the Judge of the *Sudder* Court, on the 5th of *June*, 1841, and to Mr. *Tayler* the proceedings in the Court below seemed as irregular and unwarrantable as they appear to us. He accordingly called upon the Court below to explain its proceedings, and required a report as to whether any proceeding had been recorded in this suit, in conformity with the proceedings of section 10, Reg. XXVI. of 1814, and in what respect the questions put by the principal *Sudder Amin* to the Plaintiff were relevant to the cause. To this requisition the following report was returned by the Judge, on the 10th of *July*, 1841:—"The facts are as follows, viz. after the four pleadings had been completed, a notification was issued, specifying that the case would be taken after eight days; subsequently thereto, the case was brought up, when it appeared to me unnecessary to call for evidence in favour of, and against, the claim; consequently no such proceeding was recorded, and the case was de-

1851.

DOUGLAS v. THE COLLECTOR OF BENARES.

cided. As the suit was brought to recover the sale-proceeds of the village of *Lehurtara* from Government, by right of a decree, declaring the validity of the mortgage, prior to the filing of the decree, the questions aforesaid were put with the view of ascertaining the nature of the mortgage; when, however, Plaintiff put in the decree, and it appeared therefrom that it was not passed against the mortgaged villages, it did not appear right to cause Government to refund the sale-proceeds, and the claim was in consequence dismissed."

It is impossible to avoid expressing some astonishment that any Judge could so entirely have miscarried, in the discharge of his duty, as the principal *Sudder Amin* appears by his own report to have done.

There were only two courses which it was possible, with any share of reason, to adopt: the one was, if the proceeding were regarded as a supplemental proceeding to the suit of *Jykishen Das* against *Shookr-oollah* and *Gholam Ahmud*, and the facts were considered to be sufficiently established on the part of the Plaintiff, to make at once a decree in his favour; the other was, to direct the evidence to be taken, and give the parties an opportunity of establishing their respective allegations. To dismiss the suit, under such circumstances, was utterly out of the question.

On the 12th of *October*, 1841, the cause came on for hearing before Mr. *Tayler*, who considered, very properly, that the great question was, whether the villages in question were the property of *Shookr-oollah*; for if they were, they were clearly subjected by the decree of 1835 to the demand of the Plaintiff, and if they had been sold by the Collector as the property of *Gholam Ahmud*, with notice of the Plaintiff's equitable

claim, the Plaintiff had a plain right to recover the amount which had been received by the Collector.

Upon both these points, the latter of which, indeed, was not in controversy, Mr. *Tayler* was of opinion in favour of the Plaintiff, for reasons distinctly stated in a very able judgment, and he accordingly pronounced his decree, that the decision of the principal *Sudder Amin*, of *Benares*, be overruled, and that the Plaintiff do recover from the Collector the amount of his decree, to the extent of the amount which may have been appropriated from the sale-proceeds, and carried to the credit of the Government, together with interest thereon from the date of the institution of the suit to the time of payment, and that the Plaintiff's costs, with interest from the date of the decision to the date of payment, be paid by the Collector.

The decision of the inferior Court being reversed, it became necessary that the papers should be laid before another Judge of the *Sudder* Court (Mr. *F. Currie*), who, unfortunately, differed from Mr. *Tayler*, and thought the suit should be dismissed; and the third Judge, Mr. *G. Powney Thompson*, concurred in that opinion, and, accordingly, the suit was dismissed with costs; the Plaintiff having been actually refused the opportunity of giving evidence in support of his case, if it were not already proved.

We are clearly of opinion, that the decree must be reversed, and judgment given in favour of the Appellant.

The case itself is one of the simplest description. The Plaintiff's testator having an equitable mortgage on the villages in question, of which the legal title was in *Gholam Ahmud*, institutes a suit against the mortgagor to recover the amount of his demand.

1851.

DOUGLAS v. THE COLLECTOR OF BENARES.

Pending the suit, and while *Gholam Ahmud*, the representative of the mortgagor, is a party to it, the Collector sells the property as if it were *Gholam Ahmud's* unincumbered estate, suppressing all mention of the mortgage of which he had notice. The demand in the original suit being established, this suit is brought to recover the amount which had been realised by the sale.

The objections founded on the Regulations of Limitations have obviously no bearing in the case. There has been a continued and uninterrupted claim from 1818 to the present time. As little ground is there for the objections founded on the Regulations with respect to Government sales. It is said that when property is sold by the Government for general debts, and not for arrears of revenue, they sell only the interest of the debtor, and do not guarantee the title. This may be very true, and it is an important distinction between the two classes of sales, but it has no bearing upon the present case. Here the Government officer, having notice of an incumbrance, which is only an equitable charge on the property, suppresses all mention of it in the advertisement of sale, and conveys away the estate to the purchasers as unincumbered, and receives the full value as if it were free from mortgage. Can there be a clearer equity to call for repayment? or could there be a grosser injustice than to sue the purchasers? if indeed against them any case could be established, which is very doubtful.

The only doubt which we have felt is, whether a strict adherence to form might require us to remit the case back to *India*, in order to give the Government an opportunity of going into evidence to prove the allegation in their supplemental answer, that the

property really belonged to *Gholam Ahmud*. But, upon a minute examination of the proceedings, and a careful consideration of them, we are of opinion, that it was not competent to the Collector in this suit to dispute the ownership of *Shookr-oollah*. The Collector claimed under or in right of *Gholam Ahmud*, and as against him we consider the demand to have been established upon the estate, as part of *Shookr-oollah's* assets, by the decree of 1835, and we think that Mr. *Tayler* took a correct view on the subject in his judgment.

We shall humbly advise Her Majesty, therefore, to reverse the decree complained of, and to direct the amount received by the Collector from the sales of the villages in question, with interest thereon, according to the rate payable in such cases, to be applied, as far as they will extend, in payment of the Appellant's demand. The Appellant must have his costs of the suit below against the Collector, and must, of course, be repaid what he has paid to the Government.

We have gone at so much length into the case, not only on account of its importance in point of value, and because such detail was requisite in order to explain more clearly the grounds of our judgment, but because some of the irregularities which have taken place are of a character which we think it may be useful to bring to the attention, not only of the Courts in *India*, but of the authorities at home, who, we are very sure, are desirous that justice should be administered in these Courts fairly and indifferently, between themselves and their subjects.

In re Rajah Bommaranjee Bahadoor.*

On appeal from the Sudder Dewanny Adawlut at Madras.

20th Feb., 1852.

Motion to rescind order of the *Sudder* Court, at *Madras*, for the execution, of a decree pending an appeal, and to stay execution, refused, on the ground of the length of time that had elapsed from the making of the order and the probability of its having been acted on in *India*.

THIS was an application to stay execution of a decree of the *Sudder Dewanny* Court, at *Madras*, pending an appeal to *England*. By the decree of the *Sudder* Court, it was declared, that the Defendant (the Petitioner) was liable for principal and interest upon a mortgage bond. The Petitioner appealed from that decree to *England*. After the allowance of the appeal, the Court, upon the petition of the Plaintiff, and his depositing security, by an order, dated the 24th of *December*, 1851, directed execution of the decree. The Petitioner presented a petition to the *Sudder* Court for stay of execution, offering to give security for satisfaction of the decree, which the Court refused. The Petitioner now presented a petition praying that the order of the 24th of *December*, 1851, might be rescinded, and that, upon his giving security, execution might be stayed.

Mr. *Forsyth*, in support of the petition.

It was unjust to order execution of the decree of the *Sudder* Court, pending an appeal, the Petitioner

* Present: Members of the *Judicial Committee*,—The Lord Justice Cranworth, the Lord Justice Knight Bruce, the Right Hon. Dr Lushington, and the Right Hon. Sir Edward Ryan

having offered ample security for satisfaction of the decree if affirmed here. Execution of a decree is stayed pending an appeal to the House of Lords. Even if the Court below refuse it, the House of Lords will stay execution (*a*). So also in writs of error, execution is stayed, 3 *Hen.* VII., c. 10. From the nature of the appellate jurisdiction of this Court, the practice must be the same as the House of Lords. —[Sir *Edward Ryan:* The appeal in this case is from the *Sudder Dewanny* Court; now, the course pursued by the decree holder in this case seems to be perfectly regular, and in accordance with the practice of the Native Courts, as laid down in *Macpherson* (*b*). There is no provision in the Charter for staying execution pending an appeal to *England* from the *Sudder* Courts. It is different in the Supreme Court, for there special provision is made by the Charter (*c*).]

Lord CRANWORTH:

The order complained of was made on the 24th of *December*, 1851, and has most probably been acted upon: it is too late to make this application, which must be refused.

(*a*) Macqueen's Prac. of House of Lords, 239
(*b*) "On civil procedure," p. 349, 504.
(*c*) Madras Charter, 26th Dec., 1800, cl. xlviii.

In re Rajah Vassareddy Lutçhmeputty Naidoo.*

On petition from Madras.

16th June & 5th July, 1852.

In suits before the *Sudder Dewanny Adawlut* at *Madras*, that Court decided in favour of A.; and pending appeals to *England* by B. and others, put A. into possession of the disputed estates, which were of great value, without taking from him the security required by Mad. Reg. VIII. of 1818, sec. 4. The Judicial Committee of the Privy Council reversed the decree of the *Sudder Dewanny Adawlut*, and directed that Court to put B. into possession of the estates. Pending the appeals the Board of Revenue took possession, sold a portion of the estates for satisfaction of arrears of revenue, and became themselves purchasers. The *Sudder Dewanny* Court declined to interfere or carry into execution the Order in Council confirming the report of the Judicial Committee, on the ground, that the estates were then in the possession of the *Madras* Government. Upon a petition by B. to the Judicial Committee complaining of such refusal, a peremptory order was issued, commanding the *Sudder Dewanny Adawlut* forthwith to carry into execution the Order in Council made on the appeals, and to direct the Collectors of the districts in which the estates were situate to put B. into possession, according to the terms of the Order in Council.

The application being *ex parte* was postponed for notice to be given to the *East India* Company and the Board of Control, of the petition and proceedings.

THIS was an application upon petition, by *Lutchmeputty Naidoo*, for a peremptory order addressed to the Judges of the *Sudder Dewanny Adawlut* at *Madras*, commanding them to carry into execution an order of Her Majesty in Council, confirming a report of the Judicial Committee of the Privy Council, made in the joint appeal of "*Rungama* v. *Atchama*" and "*Atchama* v. *Ramanadha*" (*a*), and praying, that the Petitioner

* Present: Members of the *Judicial Committee*,—Lord Cranworth, Lord Justice Knight Bruce, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

(*a*) See case reported, 4 Moore's Ind. App. Cases, 1.

1852.

IN RE RAJAH VASSAREDDY LUTCHME-PUTTY NAIDÓO.

might be put into possession of the lands and other property, the subject of the appeals, and which was awarded to him by such report and order.

The petition, after setting forth the fact of the institution of the suits in *India*, alleged, that at the period when the decrees of the Provincial and *Sudder* Court, appealed from to *England*, were pronounced, the whole of the property claimed by *Rungama*, as guardian of the Petitioner, was under attachment and management of the Collectors appointed by the Board of Revenue, acting in the districts of *Guntoor* and *Masulipatam*. That on the 6th of *May*, 1833, while the appeals to *England* were pending, *Vassareddy Ramanadha Baboo* presented a petition to the *Sudder Dewanny Adawlut*, praying that Court to cause possession of the property to be delivered over to him. That by a proceeding of the Court, on the 10th of *June*, 1833, it was stated, that *Vassareddy Ramanadha Babóo* could obtain possession of the property only on giving security, and that there was a specific rule in his case which required that he should furnish security; and the prayer of his petition was rejected. That the rule referred to by the Court in their proceeding, was Reg. VIII. of 1818, which enacted as follows:—"The Court of *Sudder Adawlut* may either order the judgment passed by them to be carried into execution, taking sufficient security from the party in whose favour the same may be passed, for the due performance of such order or decree as His Majesty, his heirs or successors, shall think fit to make on the appeal, or suspend the execution of their judgment during the appeal, taking the like security in the latter case from the party left in possession of the property adjudged against him; but in all cases se-

1852.

IN RE RAJAH VASSAREDDY LUTCHME-PUTTY NAIDOO.

curity is to be given by Appellants to the satisfaction of the *Sudder Adawlut*, for the payment of all such costs as the said Court may think likely to be incurred by the appeal, as well as for the performance of such order or judgment as His Majesty, his heirs or successors, may think fit to give thereupon; and after receiving such security, the *Sudder Adawlut* are to declare the appeal admitted, and to give notice thereof to the Appellant and Respondent respectively, that they may take measures, the one to prosecute, the other to defend, the cause, in appeal before His Majesty in his Privy Council, according to the established mode of proceeding in similar cases."

That in the month of *January*, 1834, *Vassareddy Ramanadha Baboo* presented another petition to the same Court, praying that he might be placed in possession of the property pending the appeal upon giving the security required by the above-recited Regulation VIII. of 1818. That in a proceeding of that Court, dated the 14th of *April*, 1834, the Court stated that it was a point formally decided by them, that no security was to be required for the Government tribute, but merely for the *Zemindar's* mesne profits, exclusively of the tribute; and they ordered, amongst other things, that it should be referred to the Collectors of *Guntoor* and *Masulipatam*, to report to the Court the aggregate gross receipts payable to the *Zemindar* in the *Vassareddy* estates for the *Fusly* year 1230 (A.D. 1820–1), or its annual average during the whole period of their management. That in a proceeding of the Court, dated the 21st of *July*, 1834, they stated, that they were of opinion, that the ends of justice would be answered by fixing the amount of security at Rs. 250,000, and it was ordered, that the

Provincial Court of the Northern Division should call upon *Vassareddy Ramanadha Baboo* to furnish good and sufficient security in that sum; and that on his producing competent security to that amount, to be approved of by the *Sudder Dewanny Adawlut*, the property be placed in his possession. That thereupon *Vassareddy Ramanadha Baboo* presented a petition to the *Sudder* Court, praying to be informed whether the security of Rs. 250,000, so required by the Court, was for the whole period during which the appeal might be pending, or for what term. That in a proceeding of the *Sudder* Court, dated the 8th of *September*, 1834, it was stated, that the period for which the security was, by the order of the 21st of *July*, 1834, required, was for one year only, and that at the expiration of that period, the *Sudder* Court would issue such further instructions as to security as might then appear expedient and equitable. That subsequently, in the same year, *Vassareddy Ramanadha Baboo* petitioned the *Sudder* Court for an allowance out of the property, and the Court granted him an allowance of Rs. 1,200 per mensem, but ordered that he should find security for that sum. That on the 31st of *March*, 1835, *Vassareddy Ramanadha Baboo* presented a petition to the *Sudder* Court, in which he stated, that he had been unable to find security for the allowance of Rs. 1,200 per mensem, and prayed that the allowance might be granted to him from the funds in deposit in the Court, without security. That in a proceeding of the *Sudder* Court, dated the 27th of *April*, 1835, it was stated, that it was essentially necessary that *Vassareddy Ramanadha Baboo* should furnish security for the eventual refunding of all payments made to him from the property in

1852.

IN RE RAJAH VASSAREDDY LUTCHME-PUTTY NAIDOO.

dispute, and the prayer of his last-mentioned petition was refused.

That in the month of *July*, 1836, *Vassareddy Ramanadha Baboo* presented a petition to the *Sudder* Court, in which he represented the condition to which the property had been reduced, in consequence, as he alleged, of its continuing under the management of the Revenue officers of Government, and submitted certain statements of the Collectors of *Guntoor* and *Masulipatam* aforesaid, showing the arrears of Government tribute then due, and prayed the *Sudder* Court to place the property in his possession without security, on the condition of his entering into an agreement not to dispose of it by sale, &c., before a decision should have been received on the appeal preferred to his late Majesty in Council. That *Rungama*, as guardian of the Petitioner, also presented a petition to the *Sudder* Court, praying that the last-mentioned petition of *Vassareddy Ramanadha Baboo* might not be granted. That in a proceeding of the *Sudder* Court, dated the 27th of *July*, 1836, it was stated, that it appeared to the Court that there could be no question that there would be no net profits from the property for several years to come, and that, consequently, on that account there could be no necessity for requiring any security whatever, previous to ordering the property to be placed in possession of *Vassareddy Ramanadha Baboo*, and it was ordered as follows,—"The Court direct that whatever lands the Collectors of *Guntoor* and *Masulipatam* may have in their charge belonging to the *Vassareddy* estate, and attached under the order of the Provincial Court, be delivered over to the Petitioner, *Ramanadha Baboo*. The Court, therefore, resolve that a copy of these

proceedings be transmitted to the Provincial Court in the Northern Division, for their information and guidance, commanding them by precept, to instruct the Collectors in the districts of *Guntoor* and *Masulipatam* to deliver over to the Petitioner, *Ramanadha Baboo*, such of the lands belonging to the *Vassareddy* estate as they may hold under attachment." That in pursuance of the above order of the *Sudder Dewanny Adawlut*, *Vassareddy Ramanadha Baboo* was placed in possession of the property in dispute, without giving the security required by section 4, of Reg. VIII., 1818.

That the Petitioner attained his majority in the month of *March*, 1837. That at divers periods in the years, 1838, 1839, and 1840, and while the appeals to His late Majesty in Council were still pending, the Petitioner presented petitions to the Board of Revenue, complaining that *Vassareddy Ramanadha Baboo* was wasting and mismanaging the estates, and praying the Board of Revenue to issue an order to put the estates under the management of the Collectors of *Masulipatam* and *Guntoor*, until the decree of His Majesty in Privy Council should be made in the appeals.

That in a proceeding of the *Sudder Dewanny Adawlut*, dated the 2nd of *May*, 1842, it was declared as follows :—" The Board of Revenue, in their letter of the 20th of *January*, 1842, intimated to the *Sudder Adawlut*, that circumstances indicative of gross mismanagement, and an intentional disregard of his engagements, on the part of *Vassareddy Ramanadha Baboo*, having been represented to them in recent reports from the Collectors of *Guntoor*, they had desired that officer to exercise his discretion in attaching the

1852.

IN RE RAJAH VASSAREDDY LUTCHME-PUTTY. NAIDOO.

estate, should the *Zemindar* fail to make payments commensurate with his collections, and that they have been since apprised by a letter, dated the 8th of *January*, 1842, that it has been found absolutely necessary that the estate should be taken under management, which has accordingly been done. The mismanagement of *Vassareddy Ramanadha Baboo* resting upon information in possession of the Revenue authorities, the *Sudder Adawlut* resolve to direct that a copy of the translations of the petitions recorded above, together with a copy of these proceedings, be transmitted to the Provincial Court in the Northern Division, commanding them by precept to instruct the Collectors of *Guntoor* and *Masulipatam* to inquire into and report upon the charges made against *Vassareddy Ramanadha Baboo*, of having made away with the proceeds of the estate during the period it was under his management, under the orders of the *Sudder Adawlut*, of the 27th of *July*, 1836."

That some time in the year 1842, possession of the property in dispute was taken from *Vassareddy Ramanadha Baboo*, and resumed by the Collectors of *Guntoor* and *Masulipatam*.

That on the 30th of *June*, 1843, and pending the appeals, the *Chintapully* and other *Talooks* in the *Zillah* of *Guntoor*, being a portion of the property in dispute, were advertised for sale, for arrears of revenue due to the Government, amounting to Rs. 26,22,921.

That on the 5th of *June*, 1843, the Petitioner presented a memorial to the Governor in Council at *Madras*, and on the same date a like memorial to the Board of Revenue, in which he protested against the intended sale, and prayed that a stop might be put to

it until the final decision of the appeals. That the Governor in Council, by an order dated the 19th of *June*, 1843, referred the Petitioner to the Board of Revenue. That on the 5th of *June*, 1843, the Board of Revenue, in answer to the memorial, informed him that the advertisement of the intended sale of the *Vassareddy* estate, for arrears of revenue, had emanated under the orders of Government. That on the 28th of *February*, 1846, while the appeals were pending, the portion of the property in dispute, previously mentioned, was again advertised to be sold on the 1st of *April*, 1846, in satisfaction of arrears of revenue. That on the 28th of *March*, 1846, the Petitioner presented a petition to the Governor in Council at *Madras*, praying that the sale might be postponed until the decree of Her Majesty in Council should be made, or that the whole of the *Vassareddy* estates might be made over to him, on condition of his paying punctually the Government tribute, and a sum of Rs. 50,000 per annum, in liquidation of the arrears due to the Government. That this petition was returned to the Petitioner by the secretary to the Government, on the 21st of *April*, 1846, with the following indorsement:—"The Petitioner is informed that the resolution of Government, dated the 20th of *January*, 1846, on the subject of the *Guntoor Zemindaries*, is final, and that the Petitioner's request cannot be complied with."

That on the 30th of *March*, 1846, the Petitioner presented a petition to the Collector of *Guntoor*, praying that he would protect the portion of the property in dispute from sale, until the decree of Her Majesty in Council should become known. That on the 6th of *April*, 1846, this petition was returned to the Peti-

1852.

IN RE RAJAH VASSAREDDY LUTCHME-PUTTY NAIDOO.

tioner by the Collector, with the following indorsement:—"The *Vassareddy* estates were, under the orders of Government, put up to public sale for arrears, and bought in on behalf of Government, on the 1st inst. The request of the Petitioner cannot be complied with."

That on the 29th of *February*, 1848, the Judicial Committee of the Privy Council, to whom the appeals had been referred, agreed to report to Her Majesty, that the decree, of the *Sudder Dewanny Adawlut* of *Madras*, dated the 14th of *March*, 1832, should be reversed. That Her Majesty in Council was graciously pleased to approve of this report, and by a decree, dated the 2nd of *March*, 1848, it was ordered and decreed (amongst other things) that the decree of the *Sudder Dewanny Adawlut* should be reversed, as in the declarations in the report set forth and recommended, and the causes were thereby remitted to the *Sudder Dewanny Adawlut* at *Madras*, to do what was necessary to give effect to the declarations in the report, whereof the Judges of the *Sudder Dewanny Adawlut* of *Madras*, for the time being, and all other persons whom it might concern, were to take notice and govern themselves accordingly.

That under and by force of this decree, and by virtue of Regulation V. of 1804, the Petitioner was entitled to be put in possession of the whole of the property in dispute, freed and discharged from all arrears of Government tribute or revenue which had become due during his minority. That by Regulation V. of 1804, section 4, it is enacted as follows:—"The lands of incapacitated proprietors shall not be answerable for the payment of public revenue assessed

thereon; and if the next collections of any year shall prove unequal to the discharge of the fixed assessment, the deficiency shall be made good by the surplus collection of future years: Provided always, that the allowance for the support of the proprietors shall be paid as well in years of deficient as of surplus produce."

That on the 23rd of *December*, 1848, and after the arrival in *India* of the aforesaid Order in Council, the Court of *Sudder Dewanny Adawlut* made an order, reciting the receipt by the Court of a despatch from the Honourable the Court of Directors, together with the decree of Her Majesty in Council, and with instructions to take the proper measures for carrying the orders of Her Majesty in Council into execution, and for recovery on behalf of the East India Company of the expense incurred by them in bringing the cases to a hearing, and the *Sudder Dewanny Adawlut* then proceeded to make the following order:—"Before issuing the usual orders for the full execution of the decree of Her Majesty in Council, the *Sudder Adawlut* resolve to direct the Civil Judges of *Guntoor* and *Masulipatam* to take the necessary steps in communicating with the Collectors of those districts to secure by immediate attachment, such property, real and personal, as may belong to the parties above mentioned, with the exception of *Puttoory Caly Doss*, the third Respondent in appeal No. 11, of 1827, who has been exonerated by the decree of the Privy Council from all liability on account of the costs;" and it was "ordered that extract from these proceedings be sent to the Civil Judges of *Masulipatam* and *Guntoor*, by precept returnable in ten days from and after its receipt."

1852.

IN RE RAJAH VASSAREDDY LUTCHME-PUTTY NAIDOO.

That on the 29th of *January*, 1849, the Petitioner presented a petition to the *Sudder Adawlut*, wherein, among other things, the Petitioner complained of certain illegal acts committed by *Ramanadha Baboo* in attempting to remove certain of the property, funds and furniture, to which the Petitioner was entitled under the aforesaid decree, and requesting that *Vassareddy Ramanadha Baboo* might be arrested for the purpose of securing the costs incurred, and to enable the Petitioner to obtain a restitution of the property which had been improperly made away with by him, and praying that the Court would immediately issue the necessary order for the release of the estates from attachment, for the purpose of restoring the estates to the Petitioner. That the *Sudder Dewanny Adawlut* took no notice of the Petitioner's last-mentioned petition.

That on the 11th of *January*, 1849, the Board of Revenue published an advertisement for the sale of the remaining portion of the property and estates, adjudged by the decree of Her Majesty in Council to belong to the Petitioner, which advertisement was as follows:—"Notice is hereby given, that unless the sum of Rs. 28,06,737, being the balance of *peishcush*, including interest outstanding up to the 20th of *December*, 1848, against the undermentioned estates, composing *Nundegamah Zemindary*, belonging to *Rajah Vassareddy Ramanadha Baboo, Zemindar*" (being part of the estate and property declared by Her Majesty's decree in Council to be the property of the Petitioner, and ordered to be delivered into the possession of the Petitioner), "shall have been liquidated on or before Monday, the 12th of *February*, 1849, the sale of the said estates will, agreeably to the instructions

conveyed by the Board of Revenue, in their proceedings dated the 11th of *December*, 1848, commence at the Collector's *cutcherry*, at *Masulipatam*, on that date, and will continue until the whole shall be sold."

That on the 8th of *February*, 1849, the Petitioner presented a petition to the *Sudder Dewanny Adawlut*, in which he protested against the intended sale as wholly illegal, and prayed that it might be stayed until the Petitioner should be put in possession of the same, and until the regular course prescribed by the Regulations had been adopted by the Board of Revenue. That in a proceeding of the *Sudder Dewanny Adawlut*, dated the 12th of *March*, 1849, the Court declared that they had referred, on the subject of the Petitioner's last-mentioned petition, to the Board of Revenue, and that from the reply of the Board the Court had learnt that the *Masulipatam Vassareddy* estate (being the estate of the Petitioner, against the sale of which he had petitioned the Court) had been purchased on account of Government, on the 12th of the then last preceding month, and they further declared that they must decline to interfere further in the matter, and ordered that the prayer of the Petitioner should be rejected.

That on the 2nd of *April*, 1849, the Petitioner again petitioned the *Sudder Dewanny Adawlut*, to put in force the decree of Her Majesty in Council. That in a proceeding of the *Sudder Dewanny Adawlut*, dated the 16th of *April*, 1849, the Court directed, among other things, as follows:—"In conformity with the decree of Her Majesty in Council, and with reference to the order of the *Sudder Adawlut*, dated the 23rd of *December*, 1848, directing the civil Judges of *Guntoor* and *Masulipatam* to take proper measures to

1852.

IN RE RAJAH VASSAREDDY LUTCHME-PUTTY NAIDOO.

secure, by immediate attachment, such property, real and personal, as may be found to belong to the above parties, the *Sudder Adawlut* now direct that the civil Judges be commanded by precept returnable in six months, from and after its receipt, to carry the decree into full execution."

That the order of the Court referred to in the last-mentioned proceeding had reference solely to the levying of costs from the Petitioner and the other parties in the appeal, and the direction of the Court to the civil Judges of *Guntoor* and *Masulipatam*, to carry the said decree into full execution, was limited to so much of the decree as relates to the levying of costs, and was not an order directing the civil Judges to put the Petitioner in possession of the property to which he is entitled, in order and by virtue of the decree of Her Majesty in Council.

That on the 21st of *December*, 1850, the Petitioner presented a petition to the Governor in Council of *Madras*, praying that the Petitioner might be put in possession of the estates and property, in conformity with the decree of Her Majesty in Council. That on the 24th of *December*, 1851, an answer was returned by the order of the Governor in Council to this petition, as follows:—"The Government cannot accede to the request contained in this petition."

That on or about the 23rd of *February*, 1851, the Petitioner presented a petition to the *Zillah* Court of *Guntoor*, praying for the delivery into his possession of the estates and property, and of Rs. 300,000, awarded to him by the aforesaid decree. That in a proceeding of the *Zillah* Court of *Guntoor*, dated the 14th of *March*, 1851, the Court stated as follows:—"The Court cannot interfere in the matter, and the

Petitioner must address himself to the *Sudder Adawlut*, who will determine as to the propriety of complying or not with the request of the Petitioner."

That the Petitioner had wholly failed in his attempts to obtain from the *Sudder Dewanny Adawlut*, or from the Board of Revenue, or from the Governor in Council, at *Madras*, possession of the estates and property awarded to him by the decree of Her Majesty in Council; and the decree remained up to the present time unexecuted, although a period of more than four years had elapsed since the decree was made; and the Petitioner suffered under the grievous hardship of a refusal on the part of the *Sudder Dewanny Adawlut*, to interfere on his behalf, for the purpose of carrying into execution a decree of Her Majesty in Council in his favour, which decree commanded the Court to do what is necessary to give effect thereto. That the Petitioner had no other means of redress open to him than by appealing to Her Majesty in Council, and obtaining a peremptory order, commanding the *Sudder Dewanny Adawlut* and all other persons whom it may concern, to carry, without further delay, the aforesaid decree into effect; and the petition prayed that Her Majesty in Council would be pleased to take the petition into Her most gracious consideration, and to grant him a peremptory order addressed to the Judges of the *Sudder Dewanny Adawlut*, or to such other persons and authorities as to Her Majesty should seem fit, commanding them to execute the decree of the 2nd of *March*, 1848, and to put the Petitioner in possession of the land and other property awarded to him by the aforesaid decree.

This petition was specially referred to the Judicial Committee.

1852.

IN RE RAJAH VASSAREDDY LUTCHME-PUTTY NAIDOO.

The petition came on to be heard *ex parte*, on the 16th of *June*, 1852, when their Lordships ordered it to stand over for service of the petition and notice of the proceedings to the Board of Control and the East India Company. They were served, but the East India Company alone appeared.

5th July,* 1852.

Upon the petition being opened,

Mr. *Wigram*, Q. C., and Mr. *E. J. Lloyd*, Q. C., for the East India Company, took a preliminary objection to the hearing.

The East India Company appear in deference to the Court's wish, but being entirely ignorant of the facts alleged in the petition, we submit, that the petition ought not to be now proceeded with, until the Petitioner has taken proper steps in *India* to bring the *Madras* Government before the Court; and we insist, that the Court has no jurisdiction in the matter; for having made a decree remitting the causes to *India* to do certain acts, the appellate jurisdiction is gone, and to entertain the petition is to exercise original jurisdiction, there being now no suits before the Court. The Petitioner has mistaken his remedy, as the proper course for him to have pursued, was to have taken proceedings in *India*, by citing the Government, or he might have brought a suit against the revenue authorities for the illegal sale of the estates. *Kirt Chunder Roy* v. *The Government* (*a*). We submit, that the proceedings complained of may be perfectly right

* Present: The Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

(*a*) 1 Moore's Ind. App. Cases, 383.

1852.

IN RE RAJAH VASSAREDDY LUTCHMI-PUTTY NAIDOO

and in conformity with the Regulations, but that we do not appear to defend the *Madras* Government, or the *Sudder* Court Judges, who have not been served with this petition; but to urge that necessary inquiries ought to be taken to ascertain the legality of the acts of the Government before the petition can be disposed of.

Dr. *Lushington:* We must now hear out the petition, and then determine the proper course to be adopted.

Mr. *Bethell*, Q. C., Mr. *Forsyth*, and Mr. *Worsley*, for the Petitioner.

First. The present application is well founded. The Petitioner does not ask the Court to interfere with third parties not before the Court. All that the petition prays is, that the decree of the Queen in Council may be carried into effect by the *Sudder* Court. What the Petitioner sought from the *Sudder* Court was a precept to the Collectors, directing them to put him in possession of the fruit of his decree; if the *Sudder* Court had complied with that request, and the Collectors refused to obey the precept, the Petitioner had his remedy in *India*, but by the *Sudder* Court holding its hands, the Petitioner has no alternative but to apply here. But, secondly, upon the merits. There are two circumstances sufficient to justify the interference of this Court to protect this property from destruction. In the first place, the *Sudder* Court was not warranted in permitting *Ramanadha Baboo* to be put in possession of the estates without taking the security required by *Madras* Reg. VIII. of 1818, sec. 4; and, again, the

1852.

IN RE RAJAH VASSAREDDY LUTCHME-PUTTY NAIDOO.

proceedings of the Revenue authorities in first causing these estates to be sold for Government arrears, and then buying them in themselves; and that after a decree, awarding possession to the Petitioner is to overrule the decree of this Court, and render its execution impossible. It would be most unjust, after the Petitioner has obtained a decree in his favour, to make him institute a fresh suit in *India* to obtain possession, because the *Sudder* Court miscarried in not enforcing the decree of this appellate Court. There is no such course prescribed by the *Madras* Regulations; on the contrary, the Regulations treat the Collector as the servant of the Court. By Reg. XXVII. of 1802, sec. 25, if the Collector omit or refuse to obey the process of the Court, then the Court from which the process issues may fine him. It is analogous to a process in this country, issuing out of the Court of Queen's Bench, where if the sheriff refused to obey the writ of the Court it would fine him for contempt. In the same way the Collector ought to have been called upon by the Court, by precept, to have carried the decree into execution. Another important question is, that the Petitioner was a minor. The estate was not under the Court of Wards, therefore Reg. V. of 1804 does not apply; but Reg. X. of 1831, sec. 2, cl. 1, in clear terms declares, that arrears accruing during minority shall not be a charge upon the estate, so as to entitle the Government to sell the estate in satisfaction of arrears.

Mr. *Wigram*, Q. C., and Mr. *E. J. Lloyd*, Q. C., for the East India Company.

This petition is quite novel, and no authority has been cited to justify the application. The petition

makes a complaint against two parties; first, against the Judges of the *Sudder* Court personally, for not having performed their duty; and, secondly, against *Ramanadha Baboo*, the party put in possession by the *Sudder* Court. If it is really intended to make any personal complaint against the Judges for contumacy to the order of this Court, they ought to have been personally served with the petition, that they might answer the charges. We only appear as representing the East India Company, and are entirely unacquainted with the statements contained in the petition. But we submit, that the *Madras* Government has a title paramount to the parties to the original appeals; the Government are no parties to the decree; they stand in the position of a landlord in possession of a leasehold estate for arrears of rent. The property ought not to be taken from the Government without giving them an opportunity of being heard They have a paramount title, and ought to have been cited by petition. This is not a proceeding *in rem* but *in personam*. We are not acquainted with the practice of the Courts in *India* in circumstances like the present. It may not be necessary for the Petitioner to institute a fresh suit to get possession. In the Court of Chancery in this country, if a new claimant intervenes, pending litigation, the Court will not decide the case against the third party, without giving him an opportunity of being heard; under some circumstances a new suit is not necessary against him, you serve him with notice of a petition, asking him to give effect to a decree, which he is interrupting. The same thing could perhaps have been done in *India*. Reg. XII. of 1809, sec. 11, cl. iv., shows that the revenue is a primary charge,

1852.

IN RE RAJAH VASSAREDDY LUTCHMEPUTTY NAIDOO.

and that the Government is bound to look to the proprietor *de facto* as distinguished from the proprietor *de jure*. It is a question which cannot be satisfactorily determined without going into evidence; we ask, therefore, that the petition may stand over, to enable the Government of *Madras* to inform the Court what the facts really are, as at present the statements are *ex parte*. No doubt there are other facts which are material to be considered before the case is decided. It may be an omission of the *Sudder* Court to put the Petitioner into possession, but that cannot affect the right of the Government, which is quite independent of any proceedings the party may have taken in the Court below.

The Right Hon. Dr. LUSHINGTON:

Their Lordships have taken into consideration this petition, which prays, that Her Majesty will be pleased to grant a peremptory order, addressed to the Judges of the Court of *Sudder Dewanny Adawlut*, or to such other persons and authorities as to Her Majesty shall seem fit, commanding them to execute the decree of Her Majesty in Council, bearing date the 2nd of *March*, 1848, and to put the Petitioner in possession of the land and other property awarded to him by the decree.

Their Lordships feel that in entering upon the consideration of this petition they are placed, for several reasons, in a position of considerable difficulty: First, on account of the entire novelty of the proceeding, this being, so far as any of us are aware, the very first time that any complaint has been addressed to the Judicial Committee, of the non-execution of a decree pronounced by them which has been confirmed

by Her Majesty in Council. And, again, we experience some difficulty from the circumstance, that all the facts which are stated in these proceedings are entirely *ex parte*, and we have had no opportunity of ascertaining whether they are in strict conformity with the papers to which reference is made in the petition.

So far as we are enabled to judge from this petition, the *Sudder* Court seems to have been of opinion, that the property in question having been seized by the Board of Revenue, and being in possession of that Board, they had alone a rightful title, with which the *Sudder* Court could not interfere, and consequently they conceived, that having ascertained that fact, they had discharged their duty, and no more depended upon them. We are not in a situation to say whether that determination, on the part of the *Sudder* Court, was well founded or not. We think it would have been infinitely better for all parties, if the grounds on which the *Sudder* Court proceeded had been set forth in a more regular form, for the consideration of their Lordships.

There are other circumstances in this case, which, provided they are incapable of explanation, certainly tend to show that the present Petitioner has been subjected to very great hardship and detriment. We allude to the circumstance of security not having been taken, in conformity with Reg. VIII. of 1818, sec. 4. We are now speaking, as already observed, solely upon what appears before us *ex parte*, and, therefore, we do not intend to pronounce any decisive judgment upon it; but, supposing all the circumstances stated in the petition to be true, it would appear that this large property was put into the hands of *Ramanadha Baboo*, pending the appeals; that it has been wasted

1852.

IN RE RAJAH VASSAREDDY LUTCHME-PUTTY NAIDOO.

and dilapidated, and the whole property exhausted, in consequence of security not having been taken. It is not, however, necessary to allude further to that point.

Their Lordships, taking all these circumstances into their consideration, have determined to adopt the following course, by which course, we trust, the rights of the East India Company, if they have any, or the rights of the Government of *Madras*, or any other persons purchasing under them, will be protected, and which will also enable the Petitioner to put the Court in motion, so that he may have all that he is justly entitled to under the decree.

We intend to advise Her Majesty, that the *Sudder Adawlut* be directed forthwith to carry into execution the Order of Her Majesty, and to direct the Collector to put the Petitioner into possession of the property, according to such order made in the decree, reserving to the *Madras* Government, and all persons, except the Respondents in the original appeal, the right to appear for their interest, if any.

The report of the Judicial Committee of the Privy Council, dated the 5th of *July*, 1852, and the Order in Council made thereon, was as follows:—

"The Lords of the Committee, in obedience to your Majesty's said order of reference, have this day taken the said petition into consideration, and having been attended by counsel on behalf of the Petitioner, and likewise on behalf of the East India Company, their Lordships do this day agree humbly to report to your Majesty as their opinion, that the said Court of *Sudder Dewanny Adawlut*, at *Madras*, ought to be ordered forthwith to carry into execution Her Majesty's Order in Council of the 2nd of *March*, 1848,

made upon the hearing of the said appeal, and to direct the Collectors of *Guntoor* and *Masulipatam*, and those districts in which the *Vassareddy* estates are situated, to put the Appellant, *Rajah Lutchmeputty Naidoo*, in possession of the said property, in pursuance of the report of this Committee, of the 29th of *February*, 1848, and of Her Majesty's Order in Council, of the 2nd of *March*, 1848, approving the same, reserving to the *Madras* Government, and to all persons, except the Respondents in the original appeal, the right to appear for their interest, if any.

"Her Majesty having taken the said report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order, as it is hereby ordered, that the said Court of *Sudder Dewanny Adawlut*, at *Madras*, do forthwith carry into execution Her Majesty's Order in Council, of the 2nd of *March*, 1848, and that the said Court do direct the Collectors of *Guntoor* and *Masulipatam*, and of those districts in which the *Vassareddy* estates are situated, to put the Appellant, *Rajah Lutchmeputty Naidoo, Bahadoor*, in possession of the said property, in pursuance of the report of the Judicial Committee of the Privy Council, of the 29th of *February*, 1848, and of Her Majesty's said Order in Council, of the 2nd of *March*, 1848, approving the same, reserving to the *Madras* Government, and to all persons, except the Respondents in the original appeal, the right to appear for their interest, if any. Whereof the Judges of the said Court of *Sudder Dewanny Adawlut* at *Madras*, for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly."

In re Sibnarain Ghose.*

On petition from the Supreme Court at Calcutta.

8th Feb., 1853.

Where this Court grants leave to appeal, under the general jurisdiction of the Queen in Council, it will impose such terms upon the party applying, as the special circumstances of the case require.

Appeal admitted from an order confirming the report of Commissioners in a partition suit, although the appealable value was under Rs. 10,000, the amount prescribed by the Order in Council of the 10th of April, 1838. The Petitioner (the Plaintiff) had offered to compensate the Defendant, if the report of the Commissioners was varied. The Judicial Committee, in granting leave to appeal, put the Petitioner upon terms of lodging in the Council Office, within four months, a certificate of recognizance to the Queen in the sum of £1,000 for such compensation and costs as might be awarded.

THIS was a petition for leave to appeal from certain orders of the Supreme Court at *Calcutta*, made in a partition suit brought by the Petitioner against one *Holladhur Doss*. The petition alleged, that the Petitioner and one *Holladhur Doss* were jointly seised as tenants in common of a piece of land at *Jorebagdun*, in the town of *Calcutta*, containing twelve *cottahs;* that the Petitioner instituted a suit on the equity side of the Supreme Court at *Calcutta*, against *Holladhur Doss*, for partition of the land; that the cause was heard by the Supreme Court, who made the usual decree for partition, and that a commission of partition was issued under such decree, authorising the commissioners to make such partition; that a return was made by the commissioners on the 19th of *September*, 1851, by which they recommended that the piece of land should be divided into two

* Present: Members of the *Judicial Committee*,—The Chief Justice of the Court of Common Pleas (Sir John Jervis), the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

shares, by a line directly north and south, and thereby allotted to the Petitioner five half equal twelfth parts, to be enjoyed by him in severalty; and also allotted to the Defendant for his share, to be held in severalty exclusive of Petitioner, all that portion on the west which abutted on one of the houses and premises of the Petitioner, namely, the house which contained the *zenana* or female apartments of his family, so as to separate and divide the opposite house and premises of the Petitioner, being the public dwelling-house of himself and family, whereby the Petitioner was excluded from a passage to the house containing the *zenana*. That the Petitioner filed exceptions to this return, urging that the partition was opposed to the justice of the case and to his claim to have the last-mentioned piece of ground to the extreme west, or that portion of it which would afford the Petitioner a passage from his own house to the other; that this last-mentioned part was of no more value to the Defendant than any other portion, but that the same was of great and peculiar value to him. That the exceptions were called on for argument, but that in consequence of the absence of his counsel to argue the exceptions, the same were overruled, as of course; and that on the 13th of *January*, 1851, an order was made confirming the Commissioners' return. That on the 29th of *March*, 1852, he petitioned the Supreme Court, that the order of confirmation should be set aside, and the exceptions restored to the Board, for the purpose of being argued before the Court, and having the whole matter explained, the Petitioner offering to pay the costs of the Defendant which might be incurred by the rehearing, which he thereby offered to expedite, but that the Court refused his petition

1853.

IN RE SIBNARAIN GHOSE.

on the 29th of *March*, 1852, and proceedings were had before the Master to settle the draft conveyances. That the Petitioner presented a petition to the Supreme Court within six months, for leave to appeal to *England*, submitting, as a cause of appeal from these orders, that on examining the plan annexed to the return, it would be found, that by the partition which the Commissioners had made, all communication was stopped between the Petitioner's family house and his dwelling-house, that is, between his *Boytuckhannah* and the house containing the female apartments; that each of these two buildings was worth more than Rs. 50,000, and, therefore, such a partition not only exposed him and his family to the greatest inconvenience, but also largely deteriorated the value of his property; that he was ready and thereby offered the Defendant Rs. 800 for each of the six *cottahs* allotted to him, although the Commissioners had, on the evidence before them, valued each *cottah* at only Rs. 400; that the loss and inconvenience to the Petitioner had been occasioned by the Commissioners drawing the line of division north and south, and assigning to the Defendant the whole of the land abutting on the female apartments, which, consequently, excluded him from any passage to that house; and the Petitioner submitted, that the line of division was erroneous, and ought to have been drawn in a different direction; and that, if the partition proposed by him was detrimental to the Defendant, the Petitioner was willing to make such compensation to him, in double the value of the land, as the Commissioners might award; that the Court, by an order dated the 1st of *July*, 1852, refused leave to appeal, on the ground that the property in dispute

was under Rs. 10,000, the amount prescribed by the Order in Council of the 10th of *April*, 1838 (*a*).

The Petitioner then applied by special petition to the Queen in Council, for leave to appeal from the return of the Commissioners, dated the 19th of *September*, 1851; and from the order of the Supreme Court confirming the same, of the 13th of *January*, 1852, and the order of the 29th of *March*, 1852.

Mr. *Leith*, in support of the petition, now moved for leave to appeal.

The Supreme Court was precluded by the Order in Council of the 10th of *April*, 1838, from admitting an appeal, as the subject-matter involved was under the prescribed appellate value, but this Court has power to admit an appeal notwithstanding, if the circumstances justify the admission. The present is a case of great hardship. The Commissioners grossly erred in judgment in making such a division; they ought to have ascertained, not only the relative value of the property, but also the respective situations of the parties in relation to the property, before the partition took place. *Story* v. *Johnson* (*a*) is directly in point, and shows that a Court of Equity will set aside an adjudication made by Commissioners of partition, in circumstances like the present.—[Sir *John Jervis*: You must undertake to save the other party harmless. It may be, that the order confirming the return of the Commissioners has been acted upon. If you come here for an indulgence, asking the rule prescribing the appealable amount to be relaxed, it ought

(*a*) See Order, 1 Moore's Ind. App. Cases, ix.
(*b*) 1 You & Coll. 538.

1853.

IN RE SIBNARAIN GHOSE.

not to be granted but upon terms (*a*). The party Respondent will have to come here to support the order of the Supreme Court, upon a point which you omitted to argue in the Court below; you must undertake to indemnify him from any loss you may put him to, as well also for compensation, if it is necessary to make any variation of the Order confirming the report of the Commissioners upon that point. What is the form of an indemnity given on appeal?]—The ordinary mode is by a recognizance in the Exchequer. —[Sir *John Jervis*: Would that give a right of action against the obligor? A recognizance in the Exchequer, if estreated, becomes a forfeiture to the Crown].—The Petitioner can enter into a recognizance with sureties in *India;* this Court can award the proceeds of a recognizance so forfeited.

The Right Hon. Dr. LUSHINGTON:

Their Lordships are disposed to allow this appeal, but it must be upon terms of the Petitioner entering into a recognizance in the Court of Exchequer, in the sum of £1,500, to abide such order as may be made, such security to be made within four months from the date of the Order in Council.

The following report was made, which was confirmed by Her Majesty:—

"Their Lordships agree humbly to report to your Majesty, as their opinion, that the Petitioner, *Sibnarain Ghose*, ought to be at liberty to enter and prosecute his appeal against the return of the Commissioners of partition, dated the 19th of *September*,

(*a*) See, In *Musadee Mahomed Cazum Sherazee*, ante, p. 196.

1851, and from the order of the Supreme Court of Judicature at *Fort William* in *Bengal*, of the 13th of *January*, 1852, confirming the return, and from the further order of the Supreme Court, of the 29th of *March*, 1852, upon lodging in the Council Office, within the space of four calendar months from the date of Her Majesty's Order in Council on this report, the certificate of recognizance to Her Majesty in a penalty of £1,500 sterling, to be entered into by some proper person (to be approved of by the clerk of the Council), before one of the Barons of Her Majesty's Court of Exchequer, conditioned to stand and abide such determination whatsoever as may be come to by this Committee on this appeal, and to pay such compensation as their Lordships may think fit to award, and likewise to pay such costs as may be awarded in case the appeal be dismissed; and their Lordships do direct that copies properly authenticated of all such records and proceedings as may be necessary to be laid before Her Majesty in Council in writing, by the proper officer of the Supreme Court of Judicature, upon payment by the Petitioner, or his agents, of the usual fees for the same."

MUTTYLOLL SEAL - - - *Appellant*,

AND

LAUNCELOT DENT and others - *Respondents*.*

On appeal from the Supreme Court at Calcutta.

10th May, 1853.

Where Bills of Exchange are remitted for sale, and the proceeds directed to be applied to a specific purpose, the property in the bills remains in the remitter until the purpose for which they were remitted is satisfied. And, where the money realised by the sale was wrongfully applied by the agent, it was held by the Judicial Committee (affirming the judgment of the Court at *Calcutta*) that the remitter was entitled to recover the value of the bills in assumpsit, upon an indebitatus count, from the purchaser of them, who had notice of the purpose for which they were remitted, and the misapplication of the proceeds by the agent.

THIS was an action of assumpsit, brought by the Respondents, merchants at *Hong Kong*, against the Appellant, a banker and merchant at *Calcutta*, to recover the value of six bills of exchange.

The plaint contained six counts. The two first counts were upon a guarantee (these counts were abandoned at the trial), the third count was an *indebitatus* count, as follows: that the Defendant was indebted to the Plaintiffs in Rs. 80,000, the price and value of divers goods and securities for money, to wit, six bills of exchange, for the payment of divers large sums of money, to wit, £6,000 of British money, of great value, to wit, of the value of Rs. 80,000, by the Plaintiffs, sold and delivered to the Defendant, at his request. The fourth count was for money had and received by the Defendant to the use of the Plaintiffs; the fifth count was for interest, and the sixth

* Present: Members of the *Judicial Committee*,—The Lord Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

1853.

MUTTYLOLL SEAL v. DENT.

count was on an account stated. To this plaint the Defendant pleaded six pleas. The first was *non-assumpsit* to the whole plaint. The remaining five pleas were all pleaded to the two special counts upon the guarantee.

The facts of the case, as they appeared in evidence at the trial, were these:—The Appellant was the *Banian* of *Oswald, Seal* & Co., who carried on business as merchants at *Calcutta*, and had dealings with the Respondents; the Appellant supported that firm with his credit, and with funds provided by him, having supplied a portion of its capital, and being in the habit of making advances to it from time to time, to enable it to meet its engagements. His son, *Heeraloll Seal*, was a partner and member of the firm of *Oswald, Seal* & Co.; and the Appellant was well acquainted with its affairs and transactions. In the year 1845, he had given to the house of the Respondents, as it was then constituted, a guarantee for the due investment and employment of such funds as might be entrusted by them to the firm of *Oswald, Seal* & Co., for the purchase of opium, and had engaged to promote the trade of the Respondents' house, on condition that they reciprocally promoted that of *Oswald, Seal* & Co.; and, at the time of the transaction in question, as well as subsequently, that firm was very largely indebted to the Appellant. On the 29th of *October*, 1847, the Respondents transmitted to the firm of *Oswald, Seal* & Co. the bills of exchange, which were the subject of the action, with a a letter, which was in part as follows:—"By our No. 19, we remit you £10,000, to be passed to credit to our opium account. We have now the pleasure to enclose the undermentioned bills on *Eng-*

1853.

MUTTYLOLL SEAL v. DENT.

land, which please realize to credit of the same account. Dated *Hong Kong*, 27th *October*, 1847, drawn by ourselves on *G. T. Braine*, Esq., in our own form and blank endorsed." Then followed the particulars of the bills for £6,000. It then proceeded: "We now give you an order for a further quantity of *Bengal* opium, to be purchased at the second sale, say about fifty chests, in proportions of three quarters *Patna* and one quarter *Benares*, and we hope that prices," &c. This letter, with the bills, was received by *Oswald, Seal* & Co. in *December*, 1847, and it appeared that at that time, or shortly afterwards, the Appellant was made acquainted with its contents, and with the purpose for which the bills were transmitted. The bills were deposited in the hands of the Appellant, whilst *Oswald, Seal* & Co. endeavoured to dispose of them, by advertising for a purchaser, in order to carry out the instructions of the Respondents. The Respondents had, on previous occasions, had various transactions with *Oswald, Seal* & Co., both in the purchase of opium, and in the purchase of cotton, and the accounts relating to the opium and those relating to the cotton were kept separately in the books of the firm, to which the Appellant had access, and he was apprised of the remittances which from time to time were made. He had himself made the purchases of opium, which *Oswald, Seal* & Co. had bought for the Respondents, and he was cognizant of the state of the accounts between the two houses at the period in question, those accounts being at that time balanced and even, with the exception of these bills. *Oswald, Seal* & Co. had no specific lien upon these bills, nor any authority to deal with them, otherwise than according to the direc-

tions contained in the above letter of the Respondents. It appeared that they at once advertised the bills in the *Calcutta* Gazette, but the time when such advertisements was made was not proved. Soon after they received them, namely, on the 11th of *December*, 1847, *Fergusson*, one of the partners of the firm, pledged them with the *Agra* bank, as a security for a loan of Rs. 55,000, made by that bank to the firm, and they were then endorsed to the bank in the name of the firm. Whether this was done with the knowledge of any of the other partners, did not appear; but one of the partners, *Brown*, was not privy to it. The bills were pledged to the *Agra* bank as a collateral security only for the loan, the firm of *Oswald, Seal* & Co. having given, as the primary security, a promissory note of the firm, which became due on the 7th of *January*, 1848, and consequently, until default was made in the payment of this note, the *Agra* bank was not entitled to negotiate the bills. At the time when the bills were thus pledged with the *Agra* bank, or immediately afterwards, the Appellant was made acquainted with the fact, and he was in daily communication with *Oswald, Seal* & Co. upon the subject of their engagements, and particularly of their debt to the *Agra* bank, and the obtaining of funds to discharge it. The bank pressed for payment, and, in order to meet the demand, the Appellant agreed with the firm of *Oswald, Seal* & Co. to supply the money. He accordingly paid the Rs. 55,000 to the *Agra* bank, on behalf of *Oswald, Seal* & Co., the bank only dealing with the firm, and knowing nothing of the Appellant in the whole transaction. The bills were accordingly given up to the Appellant,

1853.

MUTTYLOLL SEAL v. DENT.

as the agent of the firm, without any endorsement by the bank, and he retained them in his hands until the month of *April* following, when it was agreed between him and the firm that he should become the purchaser of them, at the price of Rs. 60,000, with interest, as upon a sale made upon the 7th of *January* preceding. This arrangement was afterwards communicated to the Respondents by the firm of *Oswald, Seal* & Co., by a letter, dated the 26th of *April*, 1848; and of this letter the Appellant was at the same time apprised by the firm. The bills were not endorsed to the Appellant by the firm; nor did the Appellant pay any money to the firm on account of the bills, but he was debited with the price of them in the books of the firm. At the time of, or immediately after, the sale of the bills to the Appellant, he appeared to have agreed with the firm of *Oswald, Seal* & Co. to send on to the Respondents a quantity of opium, equal in amount to the price at which he took the bills. This, however, he did not do, nor did he in any other way pay to the Respondents the price or value of the bills. It further appeared, that the Appellant subsequently sold the bills again to the firm of *Oswald, Seal* & Co., and received the amount of them in cash.

The cause came for trial on the 21st of *December*, 1849, when the Supreme Court, without calling on the Defendant, nonsuited the Plaintiffs, reserving to them liberty to move. The Plaintiffs applied under the leave reserved, and obtained a rule *nisi*, to set aside the judgment of nonsuit, and to enter a verdict for Plaintiffs for the amount of the bills of exchange, with interest, on the common count for the bills sold, inasmuch as it appeared upon the evidence that the bills

were sold to the Defendant, by *Oswald, Seal* & Co., as agents for the Plaintiffs, with notice to the Defendant that such agency existed, and that the sale was solely on the Plaintiffs' account, and that there was sufficient privity between the Plaintiffs and the Defendant to entitle the former to sue the latter upon his non-payment of the bills; or, that a new trial should be had upon that ground, or upon the ground of improper rejection of evidence.

The rule *nisi* came on to be argued on the 22nd of *March*, 1850, when the Supreme Court ordered that the judgment of nonsuit should be set aside, and that a new trial should be granted.

The cause was again tried by the Supreme Court, on the 17th of *July*, 1850, when the above facts appeared in evidence, and the Court gave a verdict for the Plaintiffs, for Rs. 60,000, the value of the bills of exchange, on the common *indebitatus* count, for goods and securities sold and delivered, reserving liberty to the Defendant to move to enter a verdict on a nonsuit, or to reduce the damages; with liberty for the Plaintiffs to move on the common count for money had and received by the Defendant to their use.

The Appellant applied for and obtained a rule *nisi* to show cause why a verdict should not be entered for him, on the ground that the sale of the bills of exchange was from *Oswald, Seal* & Co., and not from the Respondents; or why a new trial should not be had on the ground that the verdict was against evidence, or why the verdict should not be reduced to Rs. 5,000. The Respondents also obtained a cross-rule, to show cause why they should not enter a ver-

1853.

MUTTYLOLL SEAL v. DENT.

dict for the Plaintiffs, on the common count for money had and received, in case the verdict for the Plaintiffs should be set aside on the count for goods sold, on the ground, that the proceeds of the bills were received by the Defendant for the use of the Plaintiffs, and that a verdict should be entered for the Plaintiffs on the count upon an account stated; and that the damages should be increased, by the amount of interest on the sum of Rs. 60,000, from the 7th of *January*, 1848, at the rate of 6 per cent.

These rules were argued before the Supreme Court, on the 5th of *August*, 1850, when the same were respectively discharged without costs, whereby the verdict, delivered in favour of the Respondents, on the common *indebitatus* count for goods and securities sold and delivered by the Respondents to the Appellant, was maintained.

The judgment of the Supreme Court, delivered on discharging these rules, was pronounced by Sir *Lawrence Peel*, Chief Justice, as follows:—

"We propose first to state our view of the principal facts, and then to apply the law to those facts. The Plaintiffs are merchants, residing at *Hong Kong*. *Oswald, Seal* & Co. were merchants in *Calcutta*. The Defendant carried on the house of *Oswald, Seal* & Co., that is, supported it with his credit and funds, and the firm of *Oswald, Seal* & Co. were, at the time of this transaction, and subsequently, largely indebted to the Defendant. The Defendant was well acquainted with the affairs of the house; he had given a guarantee, in *October*, 1845, to the house of *Dent* & Co., which guarantee is one of the exhibits in this cause, for the due investment and employment of funds to be entrusted by *Dent* & Co. to the firm of

Oswald, Seal & Co., for the purchase of opium, and at the time of this transaction that guarantee was erroneously supposed by *Oswald, Seal* & Co., and the Defendant, to be in force. It appeared subsequently, that by a change in the firm of *Dent* & Co., after the guarantee was given, it became unavailable for the new firm of *Dent* & Co.; that part of the plaint therefore, which is founded on the guarantee, was abandoned at the trial. It was proved by *Fergusson* that the Plaintiffs in this action constituted the firm of *Dent* & Co., from *October*, 1847, until *April*, 1848, and, therefore, if there is the privity of contract on which they insist, they, as constituting the firm of *Dent* & Co., at the time of the contract of the sale of the bills, are competent to sue on it. The Plaintiffs forwarded a letter to *Oswald, Seal* & Co., which letter is one of the exhibits in this cause, dated *Hong Kong*, 29th of *October*, 1847, and which was duly received by *Oswald, Seal* & Co., and on the terms of that letter depends the first question in this cause, viz. whether the bills for £6,000 were specifically appropriated to a particular account. The terms are these—[the learned Judge here read the letter]. There were other transactions between the Plaintiffs and the firm of *Oswald, Seal* & Co., and this account was kept as a distinct account; it appears to us, reading this letter as a letter on business between merchants should be read, that it does amount to an appropriation of the bills to the opium account, and that they were remitted for sale, and that the proceeds were to be applied in the purchase of opium by *Oswald, Seal* & Co., on account of the Plaintiffs. The cases of Exp. *Dumas* (2 Ves. Sen. 582); *Tooke* v. *Hollingworth* (5 Term. Rep. 215) (and the opinion even of the dissentient Judge in

1853.

MUTTYLOLL SEAL v. DENT.

that case, if applied to such a case as the present, would support the same conclusion); and *Buchanan* v. *Findlay* (9 Bar. & Cr. 738), with many other cases, fully establish the point of the specific appropriation of these bills, and of their proceeds by the remitters. These cases show, that if bills of exchange are remitted for a specific purpose, to which the proceeds of them, whether by sale or discount, are to be applied, the property in the bills remains in the remitter until the purpose is satisfied. Here, by the terms of the letter, *Oswald, Seal* & Co. are constituted the agents of the Plaintiffs for the special purpose of realising these bills, and investing the proceeds in the purchase of opium, to be shipped on account of the Plaintiffs, for to that purpose only could the funds to the credit of the Plaintiffs on the opium account be applied by *Oswald, Seal* & Co., consistently with their instructions. The direction to carry to a separate account, according to the judgment of Lord *Hardwicke*, in Exp. *Dumas*, would of itself constitute such an appropriation; see also *Haynes* v. *Foster* (2 Crom. & Mee. 237), *Bastable* v. *Poole* (1 Crom., Mee. & Ros. 410), *Foster* v. *Pearson* (1 Crom., Mee. & Ros. 849), *Moore* v. *Barthrop* (1 Bar. & Cr. 5). These cases are not quoted as identical with the present, but merely as establishing the general rule, that a bill of exchange, though endorsed in blank, and given over, or remitted for a special purpose, is, till the purpose is satisfied, the property of the remitter, and that if the purpose is unfulfilled he may recover it back, or, waiving the tort, sue for its proceeds received by one in privity as to the wrong with the wrong doer. *Oswald, Seal* & Co. had no lien on these bills, and their authority to deal with them flowed from the mandate, and was

circumscribed by it. Very shortly after they were received by *Oswald, Seal* & Co., *Fergusson*, a partner in that firm, without the knowledge of his co-partner *Brown*, but whether with the knowledge of the other partners does not appear, committed a gross breach of trust by pledging the bills with the *Agra* bank as a security for a loan to their firm. This pledge, it was contended, created even a criminal liability under 9 *Geo.* IV., c. 74, s. 102. For obvious reasons we decline expressing any opinion on this point, but we may remark that on this point there was some inconsistency in the argument for the Defendant, for if there was no appropriation, there was no indictable offence. The evidence of *Fergusson* was strongly commented upon, and it was contended that it was untrustworthy evidence. One of the learned counsel for the Defendant contended, that the Court ought not to rely on the evidence of a witness who, having committed an indictable offence, was seeking to avert the danger of a prosecution, by giving his evidence too favourably to the Plaintiffs: upon this reason, for discrediting the witness, it is to be observed, that assuming him to be liable to be indicted, others may originate such a prosecution, and that the right to prosecute in the name of the Crown is not limited to the actual sufferer. The transaction with the *Agra* bank was this: the bank advanced a large sum (Rs. 55,000) to the firm of *Oswald, Seal* & Co., on the security of their promissory note, and took, as a collateral security, the bills in question. The loan was originally for a few days only; it was subsequently renewed for a short time, and the promissory note of the firm fell due on the 7th of *January*. The bank held the bills in pledge on deposit as a collateral se-

1853

MUTTYLOLL SEAL v. DENT.

curity, and had, therefore, no right to negotiate the bills before default in payment of the note. *Roberts* v. *Eden* (1 Bos. & Pul. 398). The bank pressed *Oswald, Seal* & Co. for payment of their note, who had not the means ready for meeting it, and payment of it was obtained, after some pressure, by the bank agreeing to take, and taking, a cheque of the Defendant's on the bank of *Bengal* for Rs. 40,000, which was paid, and by a short draft of the Defendant's for the remainder, which was also honoured at maturity. The evidence of *Neilson*, the agent of the bank, is explicit, that he dealt with *Oswald, Seal* & Co. alone, and knew them alone in the transaction. If the promissory note was paid, the bank had no further interest in the bills, and they accepted payment of the note in the mode stated, and released the collateral security, that is, the bills; it was, therefore, no sale or assignment by them of their title to the Defendant, but merely a restoration to *Oswald, Seal* & Co., on a redemption of the pledge by them. The facts admit of no other construction than that it was a redemption by *Oswald, Seal* & Co., by means of a loan to them from the Defendant, for the bank had then no right to sell the collateral security. The bank, as *Neilson* clearly proved, dealt only with *Oswald, Seal* & Co., who borrowed from them, and did not know the Defendant in the transaction; consequently the bills, when redeemed, were redeemed by *Oswald, Seal* & Co., who had no authority to obtain a loan for this purpose to the Plaintiffs from the Defendant; and as the moneys were not the moneys of *Oswald, Seal* & Co., but those of the Defendant, and were not lent by the Defendant to the Plaintiffs, and were plainly lent to somebody, it was necessarily an advance to those

who redeemed the bills with the funds supplied for that purpose. The Defendant does not set up that he took the bank's title, but relies on a purchase of the bills from *Oswald, Seal* & Co., cotemporaneous with that transaction of redemption; and he alleges, that he bought of *Oswald, Seal* & Co., and not of the Plaintiffs. The bank had a good title against the Plaintiffs, because the bank took for value, and without notice of the breach of trust; but when the bills were redeemed, they reverted to *Oswald, Seal* & Co., on the original mandate, for a fraudulent agent can acquire no property in himself by his fraud in a bill, any more than in a mere chattel, though, as to a bill, he can confer a good title to another unconscious of his fraud, and giving value; but when the fraudulent agent redeems this property, the original proprietor, the principal, is remitted to his rights; *Tayler* v. *Plumer* (3 Mau. & Sel. 574), 'an abuse of trust can confer no right on the party abusing it;' see also *Foster* v. *Pearson* (1 Crom., Mee. & Ros. 855), on the removal of that difficulty the Plaintiffs were remitted to their original rights;' and further, as to the remitter of the owner to his property after a sale in market overt, where the wrong doer purchased it back again, see *Viner's* Abr., tit. 'Market,' (A) p. 242. It makes no difference that the agent is enabled to redeem by the aid of another, therefore the intermediate pledge to the *Agra* bank does not affect the title of the Plaintiffs to this property at the time of the sale, and, of course, the sale by *Oswald, Seal* & Co. vested no property, even for a moment, in *Oswald, Seal* & Co. The contract of sale is contained in the bills of parcels of the 7th of *January*. We place no reliance on any evidence opposed to this. *Fergusson*

1853.

MUTTYLOLL SEAL v. DENT.

says, that *Oswald* told him that sale was not intended to be a real transaction. *Oswald's* declaration is no evidence. We disregard *Fergusson's* account of the sale, and of the time of it, and adopt the Defendant's evidence of the sale as contained in the bill of parcels which was put in by him, for the contract is in writing, and signed, and cannot be contradicted by parol testimony. The Defendant relies on it as the contract of sale, and there is no satisfactory evidence that that contract was abandoned, and a new one substituted for it. *Brown*, who is a witness wholly unimpeached, stated his belief to be, that it was not intended to be a real transaction: he had, however, no knowledge of the transaction, and his belief is also no evidence. The contract contained in the bill of parcels, the Defendant admits, and he produced it as his evidence, and we think that he has a right to insist that it should be viewed as the contract of sale of these bills. It is not, in the view that we take of the case, necessary to analyse particularly *Fergusson's* evidence, nor to state how far we agree with, or dissent from, the strictures upon particular portions of it. We are, however, of opinion, that reliance may safely be placed on it to the limited extent to which we apply it; some parts of it are confirmed by other evidence, and other parts by the probabilities of the case; the result of the action in no way depends upon fixing an exact date to the contract of sale, and the general form of the *indebitatus* count would equally support the contract of the 7th, or that which *Fergusson's* evidence goes to establish. The Defendant insists, that though he bought the bills, he bought of *Oswald, Seal* & Co., and not of the Plaintiffs, and that there is no privity of contract whatever between him and them. There

is no doubt, we think, that he meant to contract with *Oswald, Seal* & Co., and to buy of them, and not of the Plaintiffs, but we have no doubt that he knew whose the bills were, the agency as to them, and for what purpose they were sent. To this extent we can safely depend on *Fergusson's* evidence. *Brown* states, that the Defendant was well acquainted with the transactions of the house; he had guaranteed the due employment and investment of such funds, and was not then aware that the guarantee was not in force; he had a son in the firm, and was then its *banian*, and we think it most natural and probable that *Fergusson* should show him the letter. The Defendant's intention to buy of *Oswald, Seal* & Co. is not, under the circumstances, in our opinion, any bar to the claim of the Plaintiffs. It was urged that we ought also to conclude that *Oswald, Seal* & Co. meant to sell as principals; if, by that, is meant no more than that they meant not to disclose their principals, the answer is, that the Defendant knew who the principals were; if more be meant than this, then there is no ground for inferring anything of the kind. The presumption ought to be, that they meant to do their duty to their principals, and to sell according to their instructions, that is, as agents in the right of their principals, whether they disclosed or not who those principals were, and this presumption is not the less to be made because *Fergusson*, one of the partners, had violated his duty in a particular instance. The sale of the 7th was made by another partner, *Oswald*. An agent may so contract, in fact, as when he contracts under seal, or names himself untruly as owner or principal, in a written contract, that by some technical rule of procedure, or rule of evidence, see *Humble* v. *Hunter*

1853.

MUTTYLOLL SEAL v. DENT.

(12 Q. B. Rep. 316), the principal may not have the right to intervene and sue on the contract; he may, if he be a factor, sell in his own name, without violating any duty, but on a contract, whether verbal or in writing, and though made by a factor or an agent less intrusted, and whether it relate to goods and chattels in the most limited sense of the term, or to goods and chattels in the widest sense of the term, or even to sales of freehold estates, or to contracts of insurance, or the like, the principal has a right, though not named in the contract, and not known or disclosed at the time of the contract, to intervene and sue on the contract, as principal; and from this right to intervene and sue, no mere intention or understanding of the agent and the other contracting party can exclude him, for assuming any such to exist between the agent and the buyer on such a contract, the agent would be acting both against the general law of principal and agent, and his actual authority; and the other party, knowing him to be an agent, must be deemed, of course, cognizant of the violation of authority, and that it would be a fraud on the rights of the principal; therefore, on such a contract, the agent may not exclude the principal from the right to sue, though he do not disclose the principal. Here the agency was known; there is no evidence whatever to show that *Oswald, Seal* & Co. meant to sell in any other character than their real character, or to assume any powers beyond what belonged to them, or that they meant to exclude their principal. The principal was known, and had they meant any exclusion, their act would have been ineffectual, supposing the general right of a principal to intervene and sue to apply to a case of agency circumstanced

as the present. No authority has been quoted to show that there is any such limitation of the general rule as that contended for by the Defendant, viz. that a principal can in no case sue for the price on a sale of his bills of exchange by his agent; on the other hand, the Plaintiffs can cite no reported case of an action on a sale of his bills by an agent brought by a principal for the price; the case must, therefore, be considered by us on principle, independent of authority. Bills of exchange, like exchequer bills, are the object of sale; that they are daily sold every body knows, but they are objects of sale as much in law as in fact, see Lord *Tenterden's* judgment in *Wookey* v. *Pole* (4 Bar. & Ald. 20); there are many cases in which the contest has been, whether the transaction was a sale of the bills; if sold, they may be unpaid for, and it may be necessary to sue for the price of them. The sale may be transacted by an agent, as indeed it often would be by a bill-broker. On what principle must the action for the price be brought in his name in all such cases? The defence on a bill often is, that the Plaintiffs are but agents, and their title to sue is impeached by impeaching that of their principal, see *Lee* v. *Zagury* (1 Moore's Rep. 557); *Solomons* v. *Bank of England* (13 East, 135): the same defence is often pleaded under the new rules. The judgment of Baron *Parke* in *Bastable* v. *Poole* (1 Crom., Mee. & Ros. 412) may be consulted on this point. His observations are general, and tend to show that there is no such distinction as that contended for. No limitation is to be imposed on his words, either by the context or the reason of the thing. As, then, the general law of principal and agent applies as well to bills as to mere chattels, what is the general impe-

1853.

MUTTYLOLL REAL v. DENT.

diment to a principal's right of suit? The answer is in the nature of the instrument and of the property in it, and of the rights of a taker of that species of property to treat the apparent as the real title. One who takes a bill endorsed in blank, for value and without notice, is quite independent of the real title of the holder; he takes his title under the law merchant, and is not in the position of the assignee of a chose in action, not assignable at law. He exactly resembles in his position that of one who purchases in market overt without notice, and for value, an ordinary chattel, under the common law, from one who has no title to it or to sell it. It is the ignorance of the real state of the title which protects both. Where there is knowledge of the real truth, and that the apparent title is nothing, then the purchaser is unprotected in either case. In such a case, the purchaser of a bill stands on no better footing than the purchaser of a mere chattel, and it is immaterial in such a case that the bill is transferable by delivery, as it would be in the other case that the sale was in market overt, *Viner's* Abr., tit. "Market;" the knowledge removes the bar which might be otherwise, in certain cases, interposed by the nature of the instrument, and if there be a continuing property in the principal in the bills, and agency in another as to the transfer of the bills, then a constructive privity of contract is established in the ordinary way, and the bar being removed, the principal is not precluded by anything from intervening to sue on a sale of his bills for the price of them. If the law were otherwise, this consequence would result, that a principal whose bills, endorsed in blank, were sold by his agent, by his directions, to one who knew who the principal was,

and that the actual seller was only an agent, could not, if the latter proved fraudulent and untrustworthy before payment, himself sue for the money, if the notice were disregarded and the money not paid, though he might insist by notice to the buyer on payment to himself, and so stop payment to any other, see *Lee* v. *Zagury* (8 Taun. 114). Therefore, where bills as these were, are specifically appropriated, and the property in them is in the remitter, and they are sold by his agent, being an agent for the sale of them, and the buyer has notice of the real title, we think, notwithstanding the endorsement in blank, that the general rule of law applicable to principals and their agents on contracts, not under seal, will enable the principal to establish a privity of contract on the ordinary foundation of his property in the things sold, and through the agency as the channel which conducts the privity to the principal. This has no application to bills made payable to A., or order, and endorsed in full. Where the bill is endorsed in full, the law of merchant, according to *Pothier*, in his '*Traité du Contrat de Change*,' places the property in the endorsee, and certainly a title can be derived only through endorsement. An endorsement in blank, with delivery, is an ambiguous act. It may be intended to convey property to the party to whom delivery is made, or merely to make the bill transferable by delivery over. The bill may be delivered, in fact, to a mere servant or messenger, still *primâ facie* the state of the bill, and the possession, constitute a perfect title in the holder. But the real title may be shown and must prevail, except against those whom the law merchant protects, but the protection given to ignorance cannot be claimed by know-

1853.

MUTTYLOLL SEAL v. DENT.

ledge, nor an apparent title asserted against a real, with a knowledge always of the real state of the title. We mean to limit our opinion to those cases only where these two foundations exist of constructive privity of contract, viz. property in the bills and agency as to the sale of the bills; bills may be held without consideration, without there being any agency as to their transfer; the bills may be held adversely and tortuously, and there can be no ratification except where the act was done, on the assumption of an agency, *Heath* v. *Chilton* (12 Mee. & Wels. 632). Neither does our decision in any way extend to bills sent by one merchant to another, on a general account, though without precedent consideration; nor to bills endorsed in full, nor to any in which the property in the bills is not in the Plaintiffs, nor to any bills for the transfer of which there was no agency, nor to any bills as to which it can be predicated that the holder took *bonâ fide* on the apparent title and without notice, being entitled to consider by the law merchant the actual dealer with the bills as the owner of them. To consider a merchant who is the holder of a bill sent blank, endorsed on the general account, though the balance be against him, as having not the general property in the bill, would be to constitute him a mere factor as to bills, and to do away with the distinction between a banker holding the bills of his customer and a merchant holding bills sent by his correspondent on the general account. The bills held by the merchant in such a case pass to the assignees of the merchant on his bankruptcy, and those held by the banker, having no lien on them, and no authority to dispose of them, would not pass to the assignees of the banker, because the banker is a factor as to

1853.

MUTTYLOLL SHAH v. DENT.

bills. We admit that the cases quoted do none of them come up to this. In this sense we said in our former judgment that we went one step beyond those cases, the purpose being in this case fulfilled by sale, and not as in those violated or unperformed; but the principles on which we decide this case are, as we consider, well established, and though new in the instance, so far as we know, the action in our judgment may be supported on the broad principle of the general right of the principal, whether disclosed or not, to sue on a parol contract of sale of his property made by his agents, where no bar exists to its exercise. The cases in which an action for money had and received have been maintained for the proceeds of bills knowingly and tortuously acquired, fall short of this, for they are supportable on the same grounds as the case of *Taylor* v. *Plumer* (3 Mau. & Sel. 574), on the title to the proceeds following the title to the property, and the equitable nature of the action founds a consideration on the unconscientious retention of another man's money: on this the privity of contract in those actions is founded. But a contract of sale requires a real privity of contract, and we think it important not to invade this rule, nor to go beyond the known principles of the law of principal and agent: these principles we consider to be founded on reason, and to promote the convenience of mankind, and to be favourable to commerce, wherein so many transactions must necessarily be done through the agency of third persons. In our opinion the common form of *indebitatus assumpsit* is applicable. A bill for this purpose might be well described as 'goods,' *Comyn's* Dig., tit 'Biens,' (C.) or as wares and

1853.

MUTTYLOLL SEAL v. DENT.

merchandize. In fact, it is by the law merchant that it has its assignable quality, differing from ordinary choses of action. As it passes a legal right, no difficulty arises about the consideration. In confirmation of our opinion, on the form of the count, it is to be observed that the case of *Lawton* v. *Hickman*, (9 Q. B. Rep. 563), is an express authority, that the words 'goods and chattels' in a common *indebitatus* count have not a narrow sense, but convey the general meaning of the terms. In that case they were held to include shares; nor is this at all opposed to the case in which it was decided that a sale of shares was not within the Statute of Frauds; the words in that Statute bear a limited meaning, because the context shows that to have been the intention. It was not necessary to declare specially, since the real contract says nothing which makes a special assumpsit necessary. The argument that the contract ought to have been specially declared on, was founded on the hypothesis that there was nothing to act on but the agreement of *April* deposed to by *Fergusson*. We are however of opinion, that it would not have been necessary to declare specially even on that contract. Mr. *Morton* contended that the Court should construe the contract of the 7th of *January*, as including special terms as to payment. His argument that a contract, if adopted, should be adopted *in toto*, treats the contract as containing terms which it does not include; he would have it construed in substance as amounting to this,—in consideration of my advancing to you funds to enable you to redeem the bills, you shall sell them to me, and take payment by my writing off the debt from you to me *pro tanto;* in other words, we

are called upon to add to and vary the written contract by inference from facts. This is as much opposed to the rules of evidence as if the variance was to be made by direct testimony. That no such variation could be made by direct testimony is clear, see *Ford* v. *Yates* (2 Scott N. R. 645), and *Sharlah* v. *Benecke*, in the Common Pleas, *April* 27, 1850, reported in the 'Law Times' of *May* 25, 1850. If the law permitted this variation, still the facts are not strong enough for the inference. It was contended that this must have been the contract, viz. that payment was to have been made by writing off the debt *pro tanto*, from *Oswald*, *Seal* & Co. to the Defendant, because the time was a time of great commercial distress; and the Defendant, though a wealthy man, was somewhat pressed himself, and unwilling to make larger advances, and, therefore, that he would not make an unsecured advance; but, on the other hand, it is to be observed, that this mode of payment would have been anything but satisfactory to the Plaintiffs, who could not be expected to be quiet under it; that the guarantee was then supposed to be in force, under which, if in force, liability would have attached upon the Defendant in respect of this transaction, unless the evil was repaired; that he had a great interest in the stability of the house in which one of his sons was a partner, and which was largely indebted to him, and which might possibly, if it had been able to avert the dangers of its then position, have become ultimately able to secure the Defendant from loss, and perhaps might have become prosperous; and that the refusal of this assistance might, and probably would, have caused them to suspend payment, for it

1863.

MUTTYLOLL SEAL v. DENT.

is in proof that they were greatly indebted, were much distressed for money, and were unable to take up their promissory note given to the *Agra* bank. As these terms do not form a part of the contract, the argument fails. There is no plea of payment on record; and if there had been one on the record, such a plea could not have been supported on the facts on which this argument proceeds, see *Todd* v. *Reid* (4 Barn. & Ald. 210), and *Bartlett* v *Pentland* (10 Barn. & Cres. 760); and on the same points the case of *Barker* v. *Greenwood* (2 You. & Coll. 414) may be consulted; as also Sir *E. Sugden's* Vendors and Purchasers, vol. i. p. 74 (tenth edit). Any man buying of an ordinary agent must be presumed to know that he cannot pay the principal by giving credit in account to the agent, for the private debt of the agent to himself; that would be, as the Court said in *Todd* v. *Reid*, 'an attempt to pay the debts of one person with the money of another;' for like reason he must be presumed to know that if he assists by an advance a fraudulent agent for sale, who has improperly pledged his principal's goods, to redeem and get back the goods, and then purchases the same of the agent, he cannot pay for them by writing off that advance by himself to the agent. The principal might as well remain subject to the first lien as the new, and unless it be a transfer of the lien it cannot stand against the principal. The ignorance which protected the first dealer does not exist in the case of the second. Set off is out of the question, as the agent was known throughout to be an agent. It is necessary to say a few words in this case on the evidence. *Fergusson's* evidence, taken *de bene esse*, and on the first

trial, was put in by the Defendant to establish a contradiction between his testimony then, and on this last trial. Being evidence, the facts stated in all the examinations are before the Court. A book of the Defendant's, which was not properly admissible, was tendered in evidence, to prove an entry or entries signed by *Oswald*. The attention of the Court was called to these entries. Mr. *Ritchie* was proceeding to object to the reception in evidence of the book and of the entries, contending that the agent's subsequent declarations were not evidence, when the Chief Justice, observing on the particular nature of them, remarked, that as they were consistent with the Plaintiffs' case, there seemed to be no use in objecting; on this Mr. *Ritchie* withdrew the objection. This, however, did not make other entries in the same book evidence; and Mr. *Ritchie* states, and we have no doubt truly states, that he was not cognizant of the other entry, or assenting to its being received in evidence. Certainly the Court did not decide on the admissibility of any entry, and would, if the objection had been pressed, have rejected those first tendered in evidence; and if it were of any importance to decide on the point, we should hold that entry not in proof: but in our view of the evidence, the contest about these entries, and their correct import, is beside the real question in the cause, because the Defendant does not contend that he paid Rs. 60,000, the price of the bills, plus Rs. 55,000 advanced for the redemption, but only one sixty thousand in all, viz. Rs. 55,000 advanced for the redemption, and five thousand carried to the credit on account of the firm of *Oswald, Seal* & Co. with the Defendant. If this

1853.

MUTTYLOLL SEAL v. DENT.

could avail as payment, it should have been pleaded; but for the reasons already given we think it could not have been so pleaded. Two objections yet remain to be noticed; the first, advanced by Mr. *Morton*, that the endorsement by *Oswald, Seal* & Co., on the bill, prevented the Plaintiffs suing, since the Defendant purchased as much on that endorsement as on the drawer's and first endorser's title. This argument, though ingenious, appears to us unfounded; the endorsement by *Oswald, Seal* & Co. was to the bank; the bills coming back to the agents, the property in this bill reverted to the principals, notwithstanding the endorsement on them, they incurred liability, but did not obtain property in themselves by it; therefore, the sale was still of the Plaintiffs' bill. If it enhanced the value, which does not appear, that is not a point on which a vendee can rely to defeat the action on the bill. If an agent were to induce and advance a sale by giving his own collateral engagement for the goodness of the title or article, it would not in any way affect the principal's right to sue on the contract of sale; and if the argument were well founded, it might equally affect the title to sue by *Oswald, Seal* & Co, since it might be urged that the Defendant bought as much on the drawer's and first endorser's names as on that of the second endorser. The other objection was urged by Mr. *Dickens*, that if a remedy exists, it is in equity, and not at law. It is not necessary to say whether the Plaintiffs might have sued in equity; if they could, it must have been on a different view of the case from that advanced to support this action, on a case of fraud or unfair dealing with the bills, constituting

them trustees as to the bills or their proceeds. In our opinion, this legal right to sue on the contract of sale exists, and that is all that we are called upon to decide in this action. We think that the Plaintiffs are entitled to retain their verdict on the count for goods and bills sold. The Plaintiffs have not, in our opinion, made out any case for entering their verdict on any other count. If there was a sale, then the money received by the Defendant on a re-sale by him, was money received to his own use, and not to that of the Plaintiffs; and as to the account stated, *Brown* speaks uncertainly as to the amount; nor is it clear whether the admission refers to this contract of the 7th of *January*, or to that alleged by *Fergusson* to have been the real contract."

From this judgment the present appeal was brought.

The Appellant submitted that the judgment, so far as regarded the rule obtained by him, ought to be reversed, for the following reasons:—

First. Because the Respondents, by endorsing and remitting the bills of exchange to *Oswald, Seal* & Co., transferred to them both the possession and property in the bills, and the latter endorsed and negotiated the same for value.

Second. Because the effect of the advertisement of *Oswald, Seal* & Co., the holders, was to induce the public to believe that they had power to sell, endorse and negotiate the bills; which they accordingly did to third parties, and the Appellant became afterwards the purchaser under the endorsement of *Oswald, Seal* & Co., *bonâ fide*, and for value.

Third. Because the Respondents were not entitled

1853

MUTTYLOLL SEAL v. DENT

to recover, and ought not to have recovered, anything under the count for goods sold and delivered.

On the other hand, the Respondents submitted, that the judgment of the Supreme Court ought to be affirmed.

First. Because the bills having been transmitted to the firm of *Oswald, Seal* & Co. by the Respondents, and held by that firm as their agents, they were entitled to adopt the sale made by the firm to the Appellant as made by themselves, and on their account, and to recover the price from the Appellant, as vendee, the firm of *Oswald, Seal* & Co. having no lien upon the bills, as against the Respondents, and being bound to dispose of them on the Respondents' account, and for their benefit.

Second. Because, as the Appellant well knew all the circumstances under which the bills were transmitted to the firm of *Oswald, Seal* & Co. by the Respondents, and under which they were held by that firm, he could not set up, as against the Respondents, any right in the firm of *Oswald, Seal* & Co. to sell them on their own account, and in contravention of the right of the Respondents, as he would thus become a party to a fraud upon the Respondents, and be enabled to take advantage of his own wrong.

Third. Because bills of exchange, and other securities for money, being the subjects of sale, the principles applicable to the sale of goods and chattels must be applicable to the sale of such instruments, and when sold by an agent must be deemed to be sold subject to the rights of the principal, so as to entitle him to the benefit of the contract.

Fourth. Because, the judgment having been entered

generally upon the whole record, enough was shown upon the evidence to entitle the Respondents to retain that judgment upon some one or more of the other counts of the plaint, even if the Appellate Court should be of opinion that there is not sufficient to support the judgment upon the count for goods and bills of exchange sold and delivered to the Appellant.

They also prayed that the damages might be increased by the amount of interest at 6 per cent. upon the sum of Rs. 60,000, from the 7th of *January*, 1848.

The Attorney-General (Sir *A. Cockburn*), and Mr. *Leith*, for the Appellant.

It cannot be questioned that the Respondents, by remitting the bills in blank, authorised *Oswald*, *Seal* & Co. to dispose of them, in their discretion, as principals, and that power they exercised; first, by depositing them with the *Agra* bank for an advance of money, and afterwards by endorsing and selling them to the Appellant for a *bonâ fide* consideration. Although it is perfectly true, that if bills are put into the hands of a party for a specific purpose, he is bound to deal with them in the manner directed; yet, in the present case, *Oswald*, *Seal* & Co. were not directed to deal with the bills in any particular way; they were to put them in the market and apply the proceeds. The letter remitting the bills amounts to no more than a direction from one merchant to another to sell bills, endorsed by the sender on the sender's account, and to carry them to the sender's general account. It was a letter of advice and direction, and such notice in no wise bound the Appellant to see that the directions with respect to the applica-

1853.

MUTTYLOLL SEAL v. DENT.

tion of the proceeds was carried into effect. However reprehensible *Oswald, Seal* & Co.'s conduct may be in neglecting to apply the proceeds to the purchase of the opium, that cannot affect the Appellant, a third party; he treated *Oswald, Seal* & Co. alone as principals; there was no privity of contract between the Appellant and Respondents, he did not buy the bills from *Oswald, Seal* & Co. as the bills of the Respondents. The bills were advertised for sale, and he became the purchaser.

The action was wrong in form, it ought to have been upon a special contract, but in any circumstance the Respondents were not entitled to recover under the count for goods sold and delivered. They referred to *Bolton* v. *Puller* (*a*), *Wookey* v. *Pole* (*b*), *Collins* v. *Martin* (*c*), *May* v. *Chapman* (*d*), and *Buchanan* v. *Findlay* (*e*).

Sir *Frederick Thesiger*, Q. C., and Mr. *Badeley*, for the Respondents, were not called upon to support the judgment.

They, however, submitted, that the Respondents were entitled to have the damages increased, by allowing interest upon Rs. 60,000, from the 7th of *January*, 1848, as the contract was for sale of the bills, with interest, from that date.—[Sir *John Jervis*: Have we any power to increase the verdict? There are no facts to raise such a question. The contract you refer to is between *Muttyloll Seal* and *Oswald, Seal* & Co. The bills do not bear interest at the date, but at the maturity. When was that?]—Six months

(*a*) 1 Bos. & Pul 539.
(*b*) 4 Bar & Ald. 1.
(*c*) 1 Bos. & Pul 649.
(*d*) 16 Moo. & Wels. 355.
(*e*) 9 Bar. & Cr 738.

after sight.—[Sir *John Jervis:* That depends upon the presentment, and you have no proof of its maturity] (*a*).

Sir JOHN JERVIS:

We are of opinion in this case, that the judgment of the Court below should be affirmed. It is not necessary, in the view which we take of the case, to enter at any length into the circumstances of it, in order to ascertain whether, if the count for goods sold and delivered could not have been supported, the verdict might have been retained on any other part of the Record; nor to enter into an examination of the various cases which were collected or cited by the learned Chief Justice in the Court below, because we think, upon a very short, clear ground, that the verdict was right, and that the judgment ought to stand on the count for goods sold and delivered.

The Appellant's counsel have argued upon four grounds; first, that there was no privity of action in the contract between the parties; second, that the form of action upon the common count of *indebitatus assumpsit* is misconceived; third, that the house of *Oswald, Seal* & Co. were entitled to act as principals; and fourthly, that the title which the *Agra* bank had, was transferred to *Muttyloll Seal;* and, therefore, he is not affected by anything that took place originally between the parties. The two last are merely illustrations of the first proposition, as they put them forward as points of pleading.

(*a*) As to the power of the Judicial Committee, under its common law jurisdiction, to give subsequent interest on a judgment debt, see *The Bank of Australasia* v *Breillat*, 6 Moore's P. C. Cases, 152.

1853.

MUTTYLOLL SEAL v. DENT.

'Now, we think we must assume, not only upon the evidence of *Fergusson*, but upon the probabilities of the case, that *Muttyloll Seal* knew of the transactions that had taken place between *Oswald, Seal* & Co., and *Dent* & Co., because *Fergusson* swears distinctly, that he communicated to *Muttyloll Seal*, who was the agent of that firm, at *Calcutta*, from time to time, what occurred; that he communicated the letter sent by *Dent* & Co., dated the 29th of *October*, 1847, and that *Muttyloll Seal* knew that the opium account was squared, with the exception of this sum, amounting to £6,000. And further, it is highly probable, that such should have been done, because *Muttyloll Seal* was under guarantee, that their business should be properly carried on. Therefore, we must assume that he knew of the letter, and the answer of the 27th, which was sent to him, and that satisfies us that the bills were sent in the terms of the letter, to realise, and the proceeds to be placed to the opium account, and was answered in these respects by the letter of the 28th of *December;* the bills, therefore, were sent to them with a specific appropriation, to be realised, either by discount or sale, and the proceeds were to be placed to the credit account. *Muttyloll Seal*, therefore, knowing that such was the case, and knowing that *Oswald, Seal* & Co. were the agents of *Dent* & Co, it becomes unimportant to consider, whether he purchased the bills on the 7th of *January*, as one party says, or on the 11th of *April*, with a fraudulent ante-dating of the contract, as the other party says; because it is quite plain that with a knowledge of the fact, and knowing that *Oswald, Seal* & Co. were the agents of *Dent* & Co., he did purchase the bills. It

BENGAL SECRETARIAT LIBRARY

1852

MUTTYLOLL SEAL v. DENT.

is quite plain, looking at the transaction, with the invoice and the debit note on the one side, that he takes credit for the amount of these bills sold, and debits them on the other side with the price paid for them; that it was a transaction for the sale of these identical bills, and that being so, it is plain, that the count for goods sold and delivered is supported, because there is a sale by the agents entitled to sell, and the simple question then would be, what has been the consequence? Although it is true that *Oswald, Seal* & Co. had authority to sell, yet, having sold, the person who is the purchaser must account to the principals for the proceeds. If he honestly paid over the proceeds to *Oswald, Seal* & Co., that would be a payment to *Dent* & Co. It should have been pleaded, if he had a set off, and for any other transaction that would have been a good set off. But there were no pleas on the Record to meet such fact. That is sufficient to dispose of this case. It is useful however to observe, in order that it may not be supposed that we are proceeding on technical form or grounds, that the question raised on the pleadings in this case substantially affects the justice of the case; if there had been a plea of payment, which the facts of this case would not support, the effect of that plea nobody could doubt. These bills having been pledged with the *Agra* bank, when the time for taking them up arrived, *Muttyloll Seal* did not become endorser for value of the bills, but in truth lent money to *Oswald, Seal* & Co., to whom he was under guarantee, for the mere purpose of redeeming the bills. As he knew they were remitted for the specific purpose of purchasing opium, he had no right,

1853

MUTTYLOLL SEAL v. DENT.

with the knowledge of that fact, to apply them for the purpose of paying the debt of *Oswald, Seal* & Co. Therefore, that would not have been sufficient evidence to support the plea of payment, and in no event would the judgment have been affirmed for the Plaintiff in error. Looking to the judgment in the Court below, therefore, we are of opinion, that such judgment must be affirmed, but that there is no ground for giving interest, even if we were inclined to do so; there are no facts which could be the basis of any such judgment. The judgment of the Court below must, therefore, be simply affirmed, with costs.

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

ROBERT CASTLE JENKINS and others *Appellants*,

AND

HENRY HEYCOCK - - - - *Respondent*.*

On appeal from the Supreme Court at Calcutta.

14th June, 1853.

The warranty of seaworthiness in a time policy, at the commencement of the risk, is not a continuing obligation cast upon the assured while the risk is running. So held by the Judicial Committee, (affirming the judgment of the Supreme Court at *Calcutta*) in an action brought for a total loss, by stranding, within the time of the running of the policy, after leaving an intermediate port, the defence being, that at the time of the loss the vessel was unseaworthy by reason of an insufficient crew, she having sailed from the intermediate port without sufficient hands to work the vessel, although she had a sufficient crew at the time she started for the voyage.

Semble.—There is no implied warranty of seaworthiness in a time policy.

THIS was a question of marine insurance, the point involved being, whether, in a time policy, the vessel being seaworthy at the commencement of the risk, any unseaworthiness, by reason of the insufficiency of her crew, at a subsequent time, avoided the policy.

The action was upon a policy of insurance upon the steam ship "*Emma*," brought by the Respondent and one *Stewart* (since deceased), the registered owners and parties assured, against the Appellants, the under-

* Present: Members of the *Judicial Committee*,—The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, Knt., the Right Hon. Sir John Jervis, Knt., and the Right Hon. Sir John Patteson, Knt.

1863.

JENKINS v. HEYCOCK.

writers. The declaration was for a total loss by stranding. The Defendants pleaded eight pleas to the declaration: the material pleas were the seventh, that the ship was not seaworthy, and the eighth, that after the making the policy, and before the time covered by the policy had expired, and whilst the steamer was lying safely at anchor, to wit, in the *Madras* roads; the steamer became unseaworthy, not by reason of any of the risks or perils covered by the policy of insurance, but by reason of the desertion of a great number of her crew, and not otherwise. And that, after the steamer had become in manner aforesaid unseaworthy, and before any necessity had arisen for the steamer leaving her anchorage in the *Madras* roads for any other port or place, the master might, by reasonable care and diligence, have procured, at *Madras*, a fit and proper crew for the due navigation of the steamer, in the place and stead of those who deserted from the steamer as aforesaid; but that he wholly neglected so to do. And that afterwards, and whilst the steamer was so incompletely manned and equipped, and before any necessity for the steamer leaving her anchorage at *Madras*, the steamer proceeded on a voyage from *Madras* to *Vizagapatam*; and that, whilst the steamer was so proceeding on her voyage, the steamer, by reason of her being so improperly manned and equipped, and of there not being fit and proper persons on board the steamer to take fit and proper soundings during her last-mentioned voyage from *Madras* to *Vizagapatam*, was run ashore and wholly lost, in manner in the plaint alleged.

The Plaintiffs joined issue on all these pleas, except the eighth, to which they filed the following

demurrer:—That the eighth plea did not disclose any defence to the action, inasmuch as it merely alleged that, after the making the policy and the commencement of the risk, the master and crew of the ship neglected their duty, and the ship, by reason thereof, became unseaworthy; whereas the policy of insurance did not contain, nor does the law imply, any warranty on the part of the assured for the continuance of the seaworthiness of the vessel after the commencement of the voyage or risk, or for the performance of their duty by the master and crew during the whole of the voyage, or period insured; and that the plea did not aver or show that the Plaintiffs, or the persons interested in the insurance, had any notice of the alleged desertion of the crew, or of the vessel having been improperly manned upon her voyage from *Madras* to *Vizagapatam;* and that the plea did not sufficiently show that the loss of the steamer was attributable to the alleged negligence or misconduct of the master or crew, or how and by what means it was so attributable.

The point marked for argument was, that the law did not imply any warranty on the part of the assured, for the continuance of seaworthiness after the commencement of the voyage or risk.

The demurrer was argued on the 4th of *July*, 1850, before Sir *Lawrence Peel*, Chief Justice, and Sir *James Colvile*, when judgment was given for the Plaintiff. On the 18th of *February*, 1851, the cause was tried. It appeared from the evidence at the trial, that the policy was a time policy, and the insurance was to endure for a period of four months; namely, from the 14th of *April*, 1849, until the 14th of *August* following. During the period covered by the policy, the

1853.

JENKINS v. HEYCOCK.

"*Emma*," which was a coasting vessel, made several voyages from *Madras* to the northern and southern ports of the *Coromandel* coast. And, on her last voyage, she departed from *Madras* for the northern ports on the 12th of *June*, 1849. Two lists of seamen, comprising the crew of the "*Emma*," before the date of the policy, and on the 20th of *April*, 1849, were put in evidence. The evidence was conflicting, some of the witnesses, including the master and chief mate of the "*Emma*," thinking the crew sufficient in number and force, while other witnesses deposed that the lists themselves showed an insufficient crew. On the question of the number of men which would constitute a sufficient complement for the proper navigation and service of the "*Emma*," much evidence was taken in the cause. It further appeared that the "*Emma*," after her last arrival at *Madras* on the 5th of *June*, lay there until the 12th of *June;* and that, before she left the *Madras* roads on that day, nearly the whole of the seamen were discharged, the officers, firemen, servants, and a single lascar only remaining. Some other men appeared to have been taken on board before the ship left, but the number with which the "*Emma*" departed, it was insisted by the Defendants, were not sufficient for the navigation of the ship. It was not in dispute, that the number of the crew had been materially diminished since the preceding voyage, and the cause of the discharge of the greater part of the crew at *Madras* was not explained. The Captain, in his evidence, stated, that the discharged men were not under contract to go on, and that he might have prevented them from leaving by giving them higher wages. It was not suggested that the men left the ship

owing to any complaint in respect of wages, or even any dissatisfaction with the wages they received; on the contrary, the chief mate stated, that the reason of the discharge was to reduce the crew, with a view to diminish the expense, and that it was intended to replace them with other men at a future time; and it was proved that a further crew was ordered to be engaged to join the ship at *Coringa* by the time she arrived there. On the 13th, the day after the "*Emma*" left the *Madras* Roads, she ran aground, on her passage to *Monsoorcottah*, in fair weather, on a sandy beach. Efforts were made for some hours to get her off, but her hull became imbedded in the sand, and the ship became a total wreck, and was abandoned. The loss was attributed to the insufficiency of the crew, there not being hands enough to work the vessel.

Upon this evidence a special verdict was found on the seventh plea, that the ship was not seaworthy; namely, that she was seaworthy at the time the policy was entered into, and had a competent crew, but not seaworthy at the time of her last departure from *Madras*, and at the time of loss; the number of the crew so altered, being such as to render her unseaworthy; with liberty to the Plaintiffs to move on such last-mentioned issue: and a verdict for the Defendants on the other issues for the amount assured and interest.

The Plaintiffs, on the 11th of *March*, 1851, in pursuance of the liberty given to them, obtained a rule, calling upon the Defendants to show cause why the verdict entered for the Plaintiffs on the issue joined on the seventh and last plea should not be set aside, and judgment entered for the Defendants on that issue, on the following ground: that the policy

1853.

JENKINS v. HEYCOCK.

being a time policy, it was necessary for the Plaintiffs, in order to establish seaworthiness, to prove either that a sufficient crew was engaged for the whole period included in the policy, or to prove that the crew, at the time of the commencement of each successive voyage, or of each fresh departure from port, was a sufficient crew; and that both alternatives were negatived by the finding of the Court.

The rule *nisi* came on for argument on the 19th of *March*, 1851, and on the following day, the Supreme Court gave judgment, discharging the rule with costs. The judgment of the Court, after referring to the cases of *Dixon* v. *Sadler* (5 Mee. & Wels. 405) and *Sadler* v. *Dixon* (8 Mee. & Wels. 895), proceeded in these terms: "The judgments in these cases affirm this position, which no subsequent authority in the least degree impeaches, that the implied warranty of seaworthiness is not one for continuing seaworthiness, but only of seaworthiness at the time of the risk commencing or attaching. A vessel may be seaworthy, though in a state unfit for sea, if she be for the ordinary risk to which she then is exposed, as on a policy at and from a port where the risk attaches on her whilst in harbour; but she must, ere she departs on her voyage, be made in all respects equal to the ordinary sea risks; and in like manner her due complement of hands may vary at different stages of the navigation insured, either as to number or the quality of the crew, according to the ordinary risks and the ordinary usage of the navigation. Thus she must, to fulfil the implied warranty, take on board a pilot in certain places; but it would be preposterous to say that she must sail from the *Hqoghly* with a *Thames* pilot, or from the *Thames*

with a *Hooghly* pilot. The implied warranty as to crew is, in its nature, nevertheless the same as the implied warranty as to the hull of the vessel, its sails, furniture, equipments, &c.; it is not a warranty in a case for continuing seaworthiness." And, after referring to, and commenting upon, *Law* v. *Hollingsworth* (7 Term Rep. 160) and *Hollingsworth* v. *Brodrick* (7 Add. & Ell. 40), proceeded: "The remote causes are not regarded, but the proximate cause is merely a peril of the sea, though caused or aggravated by their neglect; in other words, the owner insures as well against sea risks so occasioned, as inevitable sea risks. If the owner did expressly warrant that the ship should in all respects continue seaworthy, he would be liable, from whatever cause her subsequent unseaworthiness proceeded; since, by our law, one who makes a positive unqualified covenant, which he might have qualified, is bound generally, because he did not limit it; therefore, the owner would, in effect, become a re-assurer to his own insurers, *pro tanto*— and, therefore, the warranty, which arises by implication of law, is properly limited by the law to the commencement of the risk. In the case of *Forshaw* v. *Chabert* (3 Brod. & Bing. 158), the vessel sailed originally with an incompetent crew, having sailed with three only for the port of destination, ten being the lowest number for that port. The implied warranty is a condition precedent, not a condition subsequent; and, on general principles, if it be once fulfilled, the contract cannot be got rid of on the ground of some subsequent omission bringing about that state of things which, if it had precedently existed, would have annulled liability under the contract."

1853.

JENKINS v. HEYCOCK.

Judgment against the Defendants was subsequently signed for Rs. 47,767. 7. 3 for damages and costs.

Against which judgment the present appeal was brought.

Mr. *Hare*, and Mr. *Paterson*, (Sir *F. Kelly*, Q. C., with them,) for the Appellants.

In the contract for insurance there is an implied warranty of seaworthiness on the part of the insurers, and a competent and sufficient crew at the departure of the ship for sea is essential to such seaworthiness. It was necessary, in order to establish the seaworthiness of the ship, for the Plaintiffs to prove, either that a sufficient crew was engaged for the whole period included in the policy, or to prove that the crew, at the time of the commencement of each successive voyage, or at each departure from port, was a sufficient crew. Now it was proved at the trial, and found by the verdict, that when the ship departed on her voyage she was not seaworthy, by reason of the incompetency of her crew, and that she was lost from that cause. It must be admitted that seaworthiness is a condition precedent to the validity of a policy. *Park* (*a*), in his Treatise on Insurance, thus states the rule: "There is in the contract of insurance a tacit and implied agreement that everything shall be in that state and condition in which it ought to be, and therefore it is not sufficient for the insured to say that he did not know that the ship was not seaworthy, for he ought to know that she was so at the time he made the insurance. The ship is the substratum of the contract

(*a*) Ch. xi., p. 322 (7th Edit.).

between the parties; a ship not capable of performing the voyage is the same as if there were no ship at all; and although the defect may not be known to the person insured, yet the very foundation of the contract being gone, the law is clearly in favour of the underwriter, because such defect is not the consequence of any external misfortune, or any unavoidable accident arising from the perils of the sea, or any other risk against which the underwriter engages to indemnify the person insured." *Douglas* v. *Scougall* (*a*) is an authority in support of this principle.—[Sir *John Jervis*: Here there is no contract to argue upon. If the insurer impliedly warrants that the ship is seaworthy, he does not impliedly warrant that she shall continue so; there is no mention of such a contract in this policy. He does not contract that she shall be seaworthy at her departure from every intermediate port, that would be going to a greater extent than there would be in a voyage policy.]—The competency or incompetency of the crew is to be determined, from time to time, according to the nature and exigency of the voyage. —[Mr. *Pemberton Leigh*: Lord *Campbell*, in *Gibson* v. *Small* (*b*), expressed his opinion, that there is not in a time policy, effected on a vessel when abroad, any implied condition whatever as to seaworthiness; not even as to the time when the vessel sailed on the voyage during which the policy attaches.]—*Gibson* v. *Small* is distinguishable from the present case, for there the ship was at sea at the day when it was intended that the policy should attach. The question of warranty of seaworthiness was not necessary to be decided in that case, and the opinions of the Judges

(*a*) 4 Dow. 269. (*b*) 4 H. L. Cases, 353.

1853.

JENKINS v. HAYCOCK.

in the House of Lords must, therefore, upon that point, be considered as extra judicial.

Mr. Serjeant *Channell*, and Mr. *J. Wilde*, for the Respondent, were not called upon to support the judgment appealed from.

Sir JOHN JERVIS:

We do not think it necessary to hear the Respondent's counsel.

My Lords are of opinion in this case, that the judgment of the Court below must be affirmed.

In truth, the case is concluded by the decision of the House of Lords, in *Gibson* v. *Small*. The learned counsel for the Appellants, who have argued this case with great ability, have in vain endeavoured to distinguish it from that case. The judgment in *Gibson* v. *Small* puts the decision higher than it is necessary to do in the present case; because, although, if it were necessary to determine, that in a time policy there is no warrant of seaworthiness, my Lords would possibly be inclined to adopt the opinion of Lord *Campbell* and the Judges to the full extent, namely, that there is no warranty of seaworthiness in a time policy. It is not necessary to decide that point to the full extent, because if, as was contended for by the Appellants, in a time policy there is a warranty of seaworthiness at the time the vessel started on her original voyage, this vessel is found by the Court below to have been seaworthy at such a time. Then comes the question, assuming she was seaworthy when she started on her voyage, is there a further warranty that she shall be seaworthy at every intermediate port she touches at, pending the progress or conti-

nuance of her voyage, which is to last for a specified time? Now, if it had been a voyage policy, there is no question, although there had been a warranty of seaworthiness when she started on her voyage, there would be no warranty that she should be seaworthy at an intermediate port at which she touched, which port she is endeavouring to make intermediate; and if it were to be held (as I took the liberty of pointing out in the course of the argument) that there was a warranty in a time policy that the ship shall be seaworthy at her departure, and at every intermediate port during the currency of the time policy, it would be holding that there is a warranty to a greater extent in a time policy than there would be in a voyage policy.

Therefore, I apprehend in this case, as in all cases, we must abide by the general rule, that a policy of indemnity, being a written instrument, the terms of that instrument must be construed subject to certain conditions, one of which is, that in a voyage policy, custom and decision have annexed to that contract a warranty of seaworthiness, and that there is no custom and no decision which warrants the Court in saying, that in a time policy any such warranty attaches. If it were necessary for the decision of the case, we should be inclined to go to the full extent of what Lord *Campbell* says in the House of Lords. It is unnecessary, however, to do so in this case; because, if there was a warranty, it was satisfied at the time the voyage commenced, and there was no warranty at any intermediate port; and, therefore, upon that, which is a lower ground, the judgment must be affirmed, and with costs.

HENRY MCKELLAR - - - *Appellant*,

AND

JOHN WALLACE and JOHN SPENCE *Respondents.**

On appeal from the Supreme Court at Calcutta.

17th & 20th June, 1853.

Principles which regulate a Court of Equity in opening stated and settled accounts.

IN this case, the appeal was brought from a decree, dated the 22nd of *February*, 1848, and an order, dated

* Present: Members of the *Judicial Committee*,—The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, Knt., and the Right Hon. Sir John Patteson, Knt.

Accounts of long standing and great complication of a mercantile firm at *Calcutta*, one of the partners of whom afterwards acted as agent in *England*, involving charges for agency and partnership transactions, were mutually agreed to be investigated and closed. After long negotiations and discussion respecting some of the charges, an agreement was come to, the parties agreeing to strike the general balance at a given sum, reserving one item of the account, amounting to a considerable sum, for future investigation. This reserved item was subsequently settled by the acceptance of a Bill of exchange for a lesser amount, as such reserved item, if opened, would have disarranged the settled general account. The Bill of exchange was dishonoured, and an action brought to recover the amount. A bill was then filed for an injunction, for the cancelment of the Bill of exchange, and that the accounts so settled might be opened. The Supreme Court at *Calcutta* held, that the reserved item being left open, was evidence that the account was not finally closed, and decreed the accounts to be opened, referring the cause to the Master.

Upon appeal, held by the Judicial Committee (reversing such decree and dismissing the bill, with costs) that the transaction amounted to an adjustment of the general accounts between the parties, subject to the reserved item which was ultimately settled, and that the accounts so settled and closed could not, in the absence of fraud, be re-opened.

The Defendant did not appeal from this interlocutory decree, but proceeded in the Master's office in respect of the matters included in the accounts; but before the general report was made by the Master, he appealed from such interlocutory decree to *England*. In reversing such decree, the Judicial Committee ordered him to pay the costs of the proceedings in the Master's office, and remitted the cause to the Court below, with directions, that the costs payable to the Defendant upon the dismissal of the bill, and the costs payable by him consequent upon his proceed-

the 19th of *July*, 1849, made by the Supreme Court at *Calcutta* in two suits pending in that Court. In the first of these suits the Appellant was Plaintiff, and the Respondents, Defendants; and in the second suit the Respondents were Plaintiffs, and the Appellant, Defendant. These suits arose out of the following circumstances:—

Previous to and up to the 6th of *June*, 1825, the Appellant carried on the business of a clothier and merchant tailor in *Calcutta*, in partnership with one *R. Gibson*, under the style of "*Gibson* & Co." On that day, *Gibson* retired from business, and the Appellant purchased his share and interest in the stock in trade and the credit of the business, and thereafter carried on the business under the same style, for his own sole use and benefit, until the 1st of *January*, 1831, when he admitted one *Leslie* (since deceased), and the Respondent, *Wallace*, into co-partnership with him in the business, for the term of twenty-one years from that date, admitting them into one-half share, and selling to them one half of the stock in trade of the business; reserving the other half of the business and stock in trade, with power to transfer the same to his brother, *Thomas McKellar*. At this time there were debts to a very large amount due to the Appellant

ings in the Master's office, should be set off, the one against the other, and the balance paid to the party entitled to the same.

Leave to appeal on an *ex parte* application was, under special circumstances, granted upon terms of the Appellant prosecuting the appeal and giving security for £500. No step was, however, taken by the Appellant to perfect the security or prosecute the appeal. The Respondents, on being served with the Order admitting the appeal, filed a counter petition to revoke the leave granted to appeal. The Judicial Committee, under the circumstances, there having been great delay, made an order putting the Appellant upon terms of lodging his petition of appeal within six weeks, or the appeal to stand dismissed, and enlarged the amount of the recognizance to £1,000 to cover the expenses occasioned by the proceedings in the Master's office, reserving the costs of the application to revoke the leave to appeal, to the hearing.

1853.

M'KELLAR v. WALLACE.

from his customers. Subsequent to the admission of *Leslie* and *Wallace* into partnership, a deed of co-partnership, dated the 29th of *May*, 1832, was made between the Appellant of the first part, *Leslie* of the second part, and *Wallace* of the third part; whereby it was agreed, that the trade should be carried on in their names for their mutual benefit, in the proportions above mentioned, under the style of "*Gibson, McKellar* & Co.," and it was further agreed, that the Appellant, at any time during the co-partnership, should be at liberty to sell, assign, and dispose of his interest to his brother, *Thomas McKellar*, and that upon the admission of his brother into the co-partnership he should be considered as the head partner of the firm; and it was further agreed, that the firm of "*Gibson, McKellar* & Co." should collect the debts due to the Appellant, from the customers of "*Gibson* & Co.," and, as a remuneration for so doing, should have the use of such monies, when collected, up to the end of the current year in which the same should be collected, free of interest, and thereafter at an interest of eight per cent. per annum, and that the money to be collected from customers of the firm of "*Gibson* & Co.," who were also customers of the firm of "*Gibson, McKellar* & Co.," should be first applied in payment of the debts due to the firm of "*Gibson* & Co.," until such debts should be satisfied; and it was further agreed that, in the event of the Appellant disposing of his share and interest in the co-partnership trade, and proceeding to *England*, the Appellant should be the agent of the firm of "*Gibson, McKellar* & Co.," in *Europe*, and that all sums of money remitted to any agent or other person by the partners of the firm for the payment of goods, &c.,

on account of the joint trade, should be remitted through the agency of the Appellant, and that *Leslie* and the Respondent, *Wallace*, in the event of the Appellant proceeding to *England*, should render to him half-yearly accounts of his private accounts with them, and at the end of every year, when a general account of the stock, &c., should be made, render to the Appellant a summary account or balance-sheet thereof.

Under this deed of co-partnership, the business of the firm of "*Gibson*, *McKellar* & Co." was carried on till the 17th of *November*, 1832, when the Appellant transferred his half share to his brother, as provided by the deed, and from that time the Appellant ceased to carry on the business; *T. McKellar*, *Leslie*, and *Wallace*, carrying on the same under the style or firm of "*Gibson*, *McKellar* & Co.," until the death of *T. McKellar*, when the business was carried on by *Leslie* and *Wallace* in co-partnership, under the style of "*Gibson* & Co." until the death of *Leslie* after-mentioned.

The firm of "*D. McKellar* & Son," of *Old Burlington Street*, *London*, clothiers, &c., had supplied and shipped all the goods and other merchandise from *England* required by the firm of "*Gibson* & Co." for eight or nine years previous to *Leslie* and the Respondent, *Wallace*, being admitted into partnership with the Appellant; and the firm of "*D. McKellar* & Son" were in correspondence with, and had supplied large quantities of goods to, the firm of "*Gibson*, *McKellar* & Co."

The firm of "*Gibson*, *McKellar* & Co.," by a power of attorney, dated the 22nd of *January*, 1838, without the knowledge or consent of the Appellant,

1863.
M'KELLAR v. WALLACE.

constituted *A. McKellar* (brother of the Appellant, and a member of the firm of "*D. McKellar* & Son"), and also the Appellant, their joint and several attorneys in *Great Britain*, to get in the debts and money due to the firm of "*Gibson, McKellar* & Co."

From the year 1833, to the month of *April*, 1838, various Bills of exchange, promissory notes, &c., in respect of debts due and owing to the firms of "*Gibson, McKellar* & Co.," and "*Gibson* & Co.," respectively, were sent by those firms to *England*, for realisation to the Appellant and also to his brother *A. McKellar*. *A. McKellar*, however, was the only person who acted under the power of attorney, except in the instance of two small debts owing to "*Gibson, McKellar* & Co.," which were got in by the Appellant and handed over by him to *A. McKellar*, as such acting attorney or agent, and who collected and realised certain of the Bills of exchange and promissory notes, and also the amount of certain debts, and accounted for what he so received to the firm of "*Gibson, McKellar* & Co." in the consignment accounts of the firm of "*D. McKellar* & Son," with the firm of "*Gibson, McKellar* & Co."

The Appellant was appointed by the deed of partnership the agent in *England* of the firm of "*Gibson, McKellar* & Co.," for the purpose of selecting for "*Gibson, McKellar* & Co." the goods and merchandise from *England* which they might require for the purposes of their trade, but, shortly after his arrival in *England*, the firm of "*Gibson, McKellar* & Co." gave instructions to the Appellant to hand over to the firm of "*D. McKellar* & Son" the indents or orders for goods and other merchandise which they, from time to time, should enclose to him, in order

that the firm of "*D. McKellar* & Son" might apply the goods and merchandise thereby ordered, and, in pursuance of such instructions, from that time all the goods and merchandise specified in the indents or orders of the successive firms of "*Gibson, McKellar* & Co." and "*Gibson* & Co.," with the exception only of some of comparatively trifling amounts, were procured and supplied by the firm of "*D. McKellar* & Son," through the Appellant, as such agent, who merely assisted in selecting such goods and merchandise, and paid for the same as agent under the beforementioned partnership deed, and charged the firms of "*Gibson, McKellar* & Co.," and "*Gibson* & Co.," commission at the rate of five per cent. for acting as agent in selecting and in advancing the money to pay for the goods and merchandise so supplied to them, in respect of which the Appellant, from the latter end of the year 1832, to *January*, 1839, made advances out of his own monies for those firms to a great amount without settling any account with them up to the latter end of the year 1831.

The members of the firm of "*Gibson, McKellar* & Co.," after the Appellant retired from the partnership, collected under the powers of the partnership deed, money to a large amount, on behalf of the Appellant, in respect of debts owing to him by the customers of the firm of "*R. Gibson* & Co.," but *Leslie*, and the Respondent, *Wallace*, after the death of *T. McKellar*, were charged with having neglected to collect a large portion of the debts so due to the Appellant, which it was alleged, in consequence of such neglect, were lost.

The Appellant, in *November*, 1837, executed a power of attorney, appointing one *Greenaway*, of

1853.
M'KELLAR v. WALLACE.

Calcutta, his attorney and agent, to recover and receive from the firm of "*Gibson, McKellar* & Co." all debts which then were, or thereafter should be, due to the Appellant, not only on account of the firms of "*R. Gibson* & Co.," and "*Gibson, McKellar* & Co.," in which he had been a partner, but also for the monies due to him from the firm of "*Gibson, McKellar* & Co.," for the goods and merchandise as settled by the firm of "*D. McKellar* & Son," and paid for by the Appellant, as such agent, and at the same time the Appellant empowered *Greenaway* to make out and finally settle all accounts between the Appellant and the firm of "*Gibson, McKellar* & Co."

This power of attorney was received by *Greenaway*, in *February*, 1838; but previously to its receipt, and on the 26th of *January*, 1838, *T. McKellar* died, having by his Will appointed *Greenaway* his executor, who proved the Will; and, shortly after the death of *T. McKellar*, his share in the business of "*Gibson, McKellar* & Co." was by deed assigned to *Leslie* and the Respondent, *Wallace*, by *Greenaway* as such executor; and by such deed, *Leslie* and *Wallace* took upon themselves the payment of all the partnership debts and liabilities to which *T. McKellar* was liable jointly with them at the time of his death, as a member of the firm of "*Gibson, McKellar* & Co."

In the beginning of the year 1838, *Greenaway*, as the Appellant's agent at *Calcutta*, rendered to "*Gibson* & Co." the Appellant's account current between him and "*Gibson, McKellar* & Co.," of all their dealings and transactions in business then remaining unadjusted (other than those which related to the collecting of and accounting for the outstanding debts due to the Appellant), from the month of

June, 1832, to the 31st of *January*, 1838. This account current, numbered 2, at the time it was so rendered by *Greenaway*, was objected to by the firm of "*Gibson, McKellar* & Co.," when *Greenaway* requested *Leslie* and *Wallace* to make out and render to him, as such agent, the accounts in the manner which they were willing to admit the same. They agreed to do so; and, accordingly, they made out and rendered their account current to *Greenaway*, up to the 31st of *January*, 1838, which was numbered 3. By such account they admitted a balance of Rs. 491,695 14a. 3p., to be due from "*Gibson, McKellar* & Co." to the Appellant, on the 31st of *January*, 1838.

The difference in amount between the accounts numbered 2 and 3, rendered by *Greenaway* on behalf of the Appellant, and by "*Gibson* & Co." respectively, was a sum of £3,757 15*s*. 1½*d*., but there was no difference whatever in such accounts as to the respective amounts of the sum total charged against "*Gibson, McKellar* & Co.," for the price of each shipment of goods. In the account No. 2, discount at the rate of two-and-a-half per cent. up to the 30th of *June*, 1836, upon the respective amounts of the sums total charged, was allowed to "*Gibson, McKellar* & Co.," and from that time to the close of the account, no discount was allowed; and a commission of five per cent. was charged upon the respective amounts of all the sums total so charged. By the account No. 3, "*Gibson* & Co." claimed to have certain discounts allowed upon amounts total charged against "*Gibson, McKellar* & Co.," for the price of shipment of goods and for commission of five per cent. charged only upon the respective amounts of all the sums total so

1853.
M'KELLAR v. WALLACE.

charged, after first deducting a discount of seven-and-a-half per cent., and the difference of interest consequent upon these differences, and such claims, represented all their objections to the account No. 2.

In consequence of these claims on the part of *Leslie*, and the Respondent, *Wallace*, many negotiations and discussions took place before the month of *September*, 1838, as to their settlement, and at length it was, in *September*, 1838, finally arranged and agreed between *Greenaway*, as the Appellant's agent, and "*Gibson* & Co.," that the firm should pay the Appellant the sum of Rs. 91,695 14a. 3p. in cash, and give a Bond for 4 *lacs* of Company's Rupees, payable quarterly by instalments of Rs. 25,000, and that the disputed item of £3,757 15*s*. 1¾*d*. should stand over for future investigation, and, accordingly, the firm of "*Gibson* & Co." paid *Greenaway* that amount in cash, and on the 24th of *September*, *Leslie* and *Wallace* executed and gave their Bond for 4 *lacs* of Rupees, payable by instalments. This Bond recited, that *Leslie* and *Wallace* had examined and investigated the several accounts of the Appellant with the firm of "*Gibson*, *McKellar* & Co.," rendered on his behalf, up to the 31st of *January*, 1838, but that they refused to admit the further sum of £3,757 15*s*. 1¾*d*. claimed as due to the Appellant, until satisfied on further investigation and examination.

In *May*, 1839, *Leslie* came to *England*, bringing with him a power of attorney from his copartner *Wallace*, expressly authorising him to settle the differences between the firm of "*Gibson* & Co." as to the disputed item of £3,757 15*s*. 1¾*d*., and such differences were accordingly finally closed and settled by *Leslie* giving to the Appellant a Bill of exchange,

dated the 31st of *August*, 1839, drawn by the Appellant upon and accepted by *Leslie* in the name of the firm of "*Gibson* & Co.," payable eighteen months after date, for Rs. 30,744 4a., a lesser sum than the reserved item.

The Bill of exchange was forwarded to *Greenaway* at *Calcutta*, who received the same in due course, and informed *Wallace* of that fact. The Bill not having been paid at maturity, the Appellant, on the 14th of *March*, 1841, brought an action on the plea side of the Supreme Court at *Calcutta* against the Respondent, *Wallace*, and *Leslie* to recover the amount. To this action the Defendants pleaded, first, that they did not accept; secondly, that the Bill was accepted at the request and for the accommodation of the Appellant, and without any consideration for the same; thirdly, that the acceptance was obtained and procured by the Appellant by fraud and covin; and fourthly, a set off. A commission for the examination of witnesses in *England* was obtained, but was not returned at the date of the trial, (the 30th of *June*, 1842,) when a verdict was given for the Appellant, for the amount of the Bill of exchange, and interest at 8 per cent.

Leslie died on the 11th of June, 1841, having by his will appointed the Respondents his executors.

While the proceedings at law were going on, the Appellant, on the 30th of *September*, 1841, filed a bill on the equity side of the Supreme Court at *Calcutta* against the Respondent, *Wallace*, as surviving partner of the firm of "*Gibson* & Co.," and also against the other Respondent, *Spence*, the executor of the late *Leslie*. The bill stated, among other things, the before-mentioned deed of co-partnership and the col-

1853.

M'KELLAR v. WALLACE.

lection and realisation, by *T. McKellar*, *Leslie* and *Wallace* of certain of the debts due to the Appellant from the customers of the firm of "*Gibson*, *McKellar* & Co.," who had been customers of the firm of "*R. Gibson* & Co.," and that other of such debts had been lost by the neglect of *T. McKellar*, *Leslie* and the Respondent to recover and get in the same, and prayed that an account might be taken of all monies which *T. McKellar*, *Leslie* and *Wallace*, or any of them, and which the Defendants, as executors of *Leslie*, or either of them, had collected or received in payment or satisfaction, either wholly or partly, of the debts due to the Complainant as such member of the old firms in which he was so interested as aforesaid; and of the debts which he had purchased or obtained from *G. T. Gibson* as aforesaid, and of all monies which *McKellar*, *Leslie* and *Wallace*, or any of them, and which the Defendants, or either of them, as such executors aforesaid, had collected or received from the customers of the new co-partnership firm, and which, according to the terms and provisions of the deed of co-partnership, had been applied towards payment of the debts due to the Plaintiff, and paid over to or placed to his credit, which but for the wilful neglect or default of *McKellar*, *Leslie* and *Wallace*, and each of them, might have been collected in or received by them; and that the Defendants might be decreed to pay him what, upon taking such account, might be found due to him; and that the Defendants should deliver over and deposit with the proper officer of the Court, all the accounts, vouchers, &c., belonging or in any way relating to the old firms in which he was interested as aforesaid; and that in the meantime the

Defendants might be restrained from collecting or receiving any of the debts due to him, and for general relief.

The Respondents, on the 23rd of *February*, 1842, put in a joint answer, admitting that *T. McKellar*, *Leslie* and *Wallace* collected and received debts and monies to a large amount on behalf of the Appellant, and which were owing to the firm of "*R. Gibson* & Co.," but they denied that any debts had become irrecoverable and lost to the Appellant by reason of any neglect or omission on their part, as alleged in the bill.

On the 1st of *March*, 1843, the Respondents filed a cross bill in the same Court against the Appellant. The bill stated, that the Appellant had been appointed as attorney to collect divers sums of money on bills, &c., for the firm of "'*Gibson*, *McKellar* & Co.," and that he never at any time rendered a true account of the collection of such monies, and, by reason of his negligence in not demanding payment of, or suing upon, certain bills, the same became irrecoverable, and barred by the Statute of Limitations; that the Appellant as such agent had charged the firm with the agency commission of five per cent., and the bill charged that the invoices sent were imperfect, incorrect, and false, the Appellant having, in breach of his duty as agent, charged higher prices in his accounts than the price actually paid by him to those from whom he had purchased, and had not allowed them discount when allowed to him, and that the accounts wanted many items which ought to have been credited to the firm of "*Gibson*, *McKellar* & Co.;" and that the members of that firm had never obtained a full, true, and faithful account of his deal-

1853.
M'KELLAR v. WALLACE.

ings, transactions, and purchases as such agent. The bill also charged, that the accounts between the firm of "*Gibson, McKellar* & Co." were still open and unsettled, and, after charging that the Appellant had in his possession the original invoices, &c., and seeking the production thereof, prayed, that the prior accounts might be opened up and re-adjusted; and for an injunction restraining him from receiving any of the debts, and that the Bill of exchange might be delivered up and cancelled, as it had been obtained by pressure and duress, and the Appellant restrained from issuing execution upon the judgment recovered by him.

The Appellant by his answer insisted, that the accounts were finally settled and closed by the payment and Bond; that after the settlement of the disputed item of £3,757 15*s*. 1¾*d*., when he considered all matters in relation thereto finally settled and adjusted, he had destroyed the greater part of the vouchers and papers relating thereto as being no longer of any value, and he submitted, that by reason of such final settlement of accounts the Respondents were not entitled to any account of such particulars as were inquired after and prayed for by their bill, previously to the 31st of *January*, 1838; and he further, by his answer, stated, that he had received from the sellers, from the years 1834 to 1836, in consequence of ready-money payments, a discount varying from 5 to 7½, and that he received a commission of 2½ per cent., as a *del credere* commission, from *June*, 1836, to end of 1837, out of the profits of the parties from whom he purchased the goods.

Witnesses were examined on both sides, and the correspondence between the parties respecting the

settlement was filed. The Appellant examined *Greenaway*, to establish the material issue, that the accounts were stated and settled as he insisted. There was no evidence to show that the Appellant had been guilty of any of the acts of fraud or duress, or that he had been guilty of neglect or default in getting in the debts due to the firms of "*Gibson, McKellar* & Co." and "*Gibson* & Co.," as alleged by the bill.

The two causes were heard together in the month of *February*, 1847, when the Chief Justice, Sir *Lawrence Peel*, pronounced the judgment of the Court, to the effect, that as there was no ground for impeaching the Bond as fraudulent, it must, therefore, be deemed a settlement as far as it extended; that there was an exception of the sum of £3,757 15*s*. 1¾*d*., which appeared to him to be the only matter substantially in dispute, that it did not appear that the accounts under settlement excluded any of *H. McKellar's* claims, and the presumption was, that all his claims were included. That the claims against the *Calcutta* firm appeared to be referable to three heads; the sum agreed to be paid as a valuation of stock, on the admission of the succeeding members to the firm of which *H. McKellar* was the sole member; the collections in *Calcutta* to be carried to account of the firm or firms centred in *H. McKellar*, and the sums advanced by him in *England*, and his charges on purchases effected by him for the house in *Calcutta;* and that these on the evidence could not be taken to have been the basis of the proposed settlement. That if, therefore, the Plaintiff in the original suit (the Appellant) was permitted to have an account of the collections from an earlier date than the date of the Bond transaction, it would be in effect re-opening the

1853.
M'KELLAR v. WALLACE.

accounts, of the settlement of which he had taken the benefit. That, therefore, the account, in the original bill, must be confined to transactions subsequent to the Bond. As to the sum excepted and reserved on giving the Bond, the Chief Justice thought that the circumstances which had taken place were such as ought not to preclude the inquiry proposed to be directed, and the Court referred it to the Master to take the accounts upon that footing.

The case was afterwards re-heard, and on the 22nd of *February*, 1848, the Chief Justice pronounced the judgment of the Court, "that the nature of the reservation (the sum of £3757. 15*s*. 1¾*d*.) out of the settled accounts was such as to be applicable to all or any of the sums included; and, therefore, they varied the former decree by referring the accounts generally, with direction, that if the Master should find a settled account, he should take the account on that footing."

The Appellant took the initiative in the Master's office, proceeding with the reference ordered by the above decree; and evidence respecting the accounts was entered into.

On the 3rd of *April*, 1849, the Master made a separate report upon the question, whether the accounts between them was or was not a settled account, and he thereby found, that the accounts between the parties in the suits, and the reserved item of £3,757 15*s*. 1¾*d*. were not, nor was either of them, settled, as contended before him on the part of the Appellant, but that the same were still open and unsettled. To this report, the Appellant took exceptions, first, that the Master had found that the accounts between the Appellant and the firm of

1853.
M'KELLAR v. WALLACE.

"*Gibson, McKellar* & Co.," up to the 31st of *January*, 1838, were not settled by the Bond, whereas he ought to have found that the whole of the accounts and dealings between the Appellant and the firm of "*Gibson, McKellar* & Co.," up to the 31st of *January*, 1838, were closed by the Bond, except as to the reserved item of £3,757 15*s*. 1¾*d*. and two other small sums, and except the amount prayed for by the Appellant's bill; secondly, that he ought to have found the reserved item of £3,757 15*s*. 1¾*d*. settled and closed by the Bill of exchange.

These exceptions were argued before the Supreme Court, and by an Order of that Court, dated the 16th of *July*, 1849, the same were over-ruled and the Master's separate report confirmed. The judgment of the Court was delivered by Mr. Justice *Colvile*, to the effect, that the Master was right in finding that there was no settlement of the accounts, in the sense in which that term was understood in a Court of equity, on either of the occasions referred to by the exceptions; and that even the language used by the Appellant himself, in making his claim before the Master, was not that ordinarily used in setting up a settled and closed account; namely, that the accounts were stated and settled, and that thereupon certain payments were made and a security given, on the footing of that settlement; but that the settlement contended for was effected by such payments and the execution of such security, and that these acts, which might be material as constructive evidence of an antecedent settlement of accounts, was treated as constituting the settlement itself. That the Bond, if taken alone, was neither an account stated, nor afforded any satisfactory evidence of an account stated; no balance being agreed upon, it being left an open question, whether

1853.
M'KELLAR v. WALLACE.

the sum admitted to be due was or not to be increased by the sum of £3,757 15*s.* 1¾*d.*; and he was of opinion, that the Plaintiff had failed to establish that in *September*, 1838, there was such a settlement of accounts as that which he set up, or that anything was done by which, in taking the accounts directed by the decree, effect could be given to it as to an account stated. That the effect of the acceptance for Rs. 30,744 4 anas, given by *Leslie* in the partnership name of "*Gibson* & Co." to *McKellar*, was not such a transaction as ought to be treated as a settlement of accounts between principal and agent, which precluded the former from having the accounts of the latter taken in a Court of equity.

Proceedings were then resumed in the Master's office, and warrants were issued at the instance of the Appellant, in pursuance of the original decree, requiring the attendance of the Respondents before the Master to go into the accounts. Meetings were had, and the accounts gone into, and other proceedings in relation thereto taken.

No appeal was asserted from the Decree pronounced in *February*, 1848, or the Order of the 16th of *July*, 1849, made on the Exceptions, but the Appellant's counsel in *Calcutta*, being of opinion that an appeal might be successfully prosecuted, intimation to that effect was communicated to the Appellant, who was resident in *England*, and a correspondence ensued respecting the evidence and proofs within the Appellant's power to verify and produce. The Appellant also took the opinion of counsel in *England*, on points relative to the expediency of an appeal, and ultimately having been advised so to do, by letters, dated the 7th and 24th of *December*, 1849, instructed his agent in *India* to direct counsel to

move for such appeal on his behalf. The instructions thus sent were, however, not available before the 20th of *February*, 1850, when the period of six months, the time limited for appealing by the *Calcutta* Charter of Justice, had expired, and the right to appeal, therefore, lost. Under these circumstances, *McKellar* presented a petition to the Queen in Council, praying for leave to appeal, notwithstanding the time limited by the Charter had expired.

This petition was heard before the Judicial Committee, *ex parte*, and, being supported by an affidavit setting forth the circumstances above stated, was allowed, upon terms of the Petitioner giving security for costs, and lodging in the Council office a certificate of recognizance in a penalty of £500.

The service of the Order made upon this petition, dated the 25th of *June*, 1850, upon the Respondents in *India*, was the first intimation they received of the appeal, and they presented a counter petition to the Queen in Council to rescind and revoke such Order. It alleged, that no notice of the application for leave to appeal had been given to them, and that proceedings in the Master's office, in the original and cross bill, had been taken by *McKellar* without any notice of his intended application. That they had no opportunity afforded them of staying proceedings, but were compelled by the steps and proceedings taken by *McKellar*, as actor, to proceed and incur great expense in the Master's office, since the passing of the Decree of the 22nd of *February*, 1848, and the Order of the 16th of *July*, 1849, and that such expenses which they had been so led into could never be recovered, if the appeal was successful, as the whole of these proceedings would be a nullity.

1853.
M'KELLAR v. WALLACE.

That two years had elapsed since the date of the Decree of the 22nd of *February*, 1848, and the time when the petition was presented to Her Majesty in Council; that the taking of the steps and proceedings, as actor, inducing them to proceed under the reference in the Master's office, was an acquiescence and submission to the Decree and Order, and a waiver of his right to appeal. That if such fact had been known to the Committee, they would have made *McKellar* give security for the costs incurred by this proceeding. That *McKellar* had not entered or prosecuted his appeal; that it was a condition precedent by the Order of Her Majesty in Council, that he should lodge a certificate of recognizance, but that he had not done so, and they prayed that such Order in Council might be reversed, and that *McKellar* might be ordered to pay the Petitioners the costs incurred. This petition was supported by an affidavit verifying the principal allegations, and was served on the Appellant's agent.

18th June 1851.*

Mr. *Leith* moved to dismiss.

This Court would not have made the Order, admitting the appeal, if it had been possessed of the knowledge of the fact of the proceedings taken in the Master's office by *McKellar*, under the Decree of the 22nd of *February*, 1848. That fact was not disclosed in the application made by him, which was *ex parte*. Moreover, the terms of the Order in Council have not been complied with. No recognizance has been entered into, nor has any petition of appeal been lodged,

* Present: Members of the *Judicial Committee*,—The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, The Right Hon. Sir Edward Ryan, Knt., and the Right Hon. Sir John Jervis, Knt.

although nearly a twelvemonth has elapsed since the date of the order.

Mr. *Wigram*, Q. C., *contrà*.

It was not thought necessary to appeal from the interlocutory decree, and, accordingly, the parties went in before the Master to take the account. When it was discovered that it was requisite and expedient to appeal, the six months limited by the Charter had expired, and this Court granted leave to appeal as an indulgence.

The Right Hon. T. PEMBERTON LEIGH:

There has been great laches, but not such as, in their Lordships' opinion, ought entirely to shut out the appeal. But further terms must be imposed upon the Appellant. The recognizance must be increased to the sum of £1,000, a sum sufficient to cover the costs incurred in the Master's office, by the Appellant forcing on the proceedings and taking the accounts; and, as the delay has been occasioned by the Appellant, the petition of appeal must be lodged in the Council office within six weeks, and if not then lodged the appeal is to stand dismissed. This course will, we think, do complete justice to all parties. We reserve the costs of this application.

By the Order in Council made upon this petition, the Appellant was directed to lodge in the Council office the certificate of recognizance to Her Majesty, in a penalty of £1,000 sterling, conditioned to stand and abide such determination as might be made, and to pay all such costs as might be awarded in case the appeal be dismissed (such recognizance to be in lieu of the aforesaid recognizance of £500, for costs in the

1853.
M'KELLAR v. WALLACE.

appeal as set forth in the Order of the 25th of *June*, 1850), and to perfect such recognizance, and lodge his petition of appeal in the Council office within the space of six weeks from the date of the report, and, in the event of failing to perfect such recognizance and lodge such petition within that period, the Order be discharged, and the costs of the petition paid by the Appellant; but if the recognizance was perfected, and the petition of appeal lodged within that period, then that the costs of the petition was to be reversed.

The appeal now came on for hearing.

Mr. *Wigram*, Q.C., and Mr. *W. A. Collins*, for the Appellant.

The simple question the Court below had to decide was, whether the transaction in question entered into in the month of *September*, 1838, amounted to a settled account up to the 31st of *January*, 1838, between the parties, and precluded the Respondents from opening the accounts again. Our contention is, that it did constitute a settled account, and that the Court below entirely misconceived the effect of that settlement. Indeed, the Bond and Bill of exchange is a bar to any such claim. The evidence of *Greenaway*, and the correspondence between the parties respecting this settlement, show beyond dispute that it was a clear case of settled account, with the reservation of one item of £3,757 15*s*. 1¾*d*. Although the investigation of that item, if it had been found to be incorrectly made up, might have disarranged the items in the prior accounts up to the 31st of *January*, 1838, yet that would not affect such settlement, and that was also settled by the acceptance of the Bill of

exchange for a less amount. The charges of wilful neglect and fraud contained in the original bill were unsupported by evidence, and wholly failed. As the accounts between the parties had been so long settled, we submit that the Decree ordering the reference to the Master to take the accounts, and that the Order overruling the exceptions, ought not to have been made. *Brownell* v. *Brownell* (*a*).—[Mr. *Pemberton Leigh:* The proceedings taken by the Appellant in the Master's office under the Order was wrong: he should have appealed at once; at all events, he ought, whichever way our judgment may be, to pay the costs of those proceedings.]—The Decree was an erroneous one. In *De Burgh* v. *Clarke* (*b*) the House of Lords held that the original Decree, pronounced more than two years before enrolment, was saved by a subsequent Order made in the cause. They referred also to *Parker* v. *Morrell* (*c*).

Mr. *Rolt*, Q.C., and Mr. *Leith*, for the Respondents.

The accounts have never been stated and settled. The Court below was, therefore, perfectly right upon the facts shown, to refer it to the Master, with liberty to surcharge and falsify the accounts. They were not closed by the transactions which had taken place. The claims made by "*Gibson, McKellar* & Co.," in the account No. 2, for discounts, over charges in respect of the shipments, and the differences of interest which formed their objection to the account, have never been settled; one of the disputed points being, whether a *del credere* commis-

(*a*) 2 Bro. C. C. 62.
(*b*) 4 Clk. & Fin. 562.
(*c*) 2 Phillips, 453.

1853.
M'KELLAR v. WALLACE.

sion was properly charged by the Appellant in his character of agent; a most important inquiry, as it converted the agent into a principal. The Respondents were wholly in the dark as to the particulars of these discounts and overcharges. They never had the vouchers, only the invoices and statements upon which the alleged settlement of the account up to the 31st of *January*, 1838, was founded. Facts which the Appellant was bound to have communicated to them were kept back at the time of executing the Bond and accepting the Bill of exchange. The statement furnished them was a *suggestio falsi*. What can be stronger proof that it was not a formal settlement than the undisputed fact, that the item for £3,757 15*s*. 1¾*d*. was reserved, and which manifestly, if wrong, would disarrange the whole of the items of the general account? That alone is sufficient to entitle us to have the accounts opened, as the Court below most clearly expressed in the judgment of Mr. Justice *Colvile*. It was not necessary to establish legal fraud: there was unfair advantage taken, and that is sufficient to justify the Court in opening the accounts. *Gibson* v. *Jeyes* (*a*), *Wood* v. *Downes* (*b*), *Montesquieu* v. *Sandys* (*c*), *Anderson* v. *Maltby* (*d*). Length of time is no bar if fraud appears in a stated account. *Vernon* v. *Vawdry* (*e*), *Allfrey* v. *Allfrey* (*f*).

The Right Hon. T. PEMBERTON LEIGH:

During the progress of this appeal, we have had an opportunity of looking very carefully through the

(*a*) 6 Ves. 266. (*b*) 18 Ves. 120.
(*c*) 18 Ves 301, 308.
(*d*) 2 Ves. 244. S. C. 4 Bro. C. C. 422.
(*e*) 2 Atk. 119. (*f*) 1 Mac. & Gor. 87.

whole of the papers in the case, and after the extremely clear and able manner in which the case has been argued at the bar, we feel ourselves in a situation to dispose of it at once, and we think it better to do so now, than to put the parties to any further delay.

The law in cases of this kind I apprehend to be perfectly clear. Parties having accounts between them, may meet and agree to settle those accounts by the ascertainment of the exact balance; and, if they mean to ascertain the exact balance, it may be necessary for that purpose, and probably is necessary in most cases, that vouchers should be produced, and that all the information which is possessed on one side and the other, should be furnished in the settlement of those accounts; and, if it afterwards turn out that there are errors in the account, it is a sufficient ground for opening the account and for setting it right in a Court of Equity. If, on the other hand, persons meet and agree, not to ascertain the exact balance, but agree to take a gross sum as the balance; a sum which one is willing to pay, and the other is content to receive as the result of those accounts; it is obvious, that the production of vouchers is entirely out of the question, and errors in the account are so also, for the very object of the parties is to avoid the necessity for producing those vouchers, upon the assumption that there are or may be errors in the account so settled, therefore, it is either an account stated and settled, in the formal sense of that expression, or, it is the case of a settlement by compromise. In either case it may be vitiated by fraud; in either case it is good for nothing, if, either from the collusion of the parties, upon the circumstances under which the settlement takes place, it is proved

1853.
M'KELLAR v. WALLACE.

in a Court of Equity, that the transaction was not so fairly and so fully understood between the parties, either from the confusion in which it was involved, or, from misrepresentations made on the one side or the other, as it ought to have been, and that injustice has been done to either side.

Now, that being the general law of the case, it appears to us very clear that the settlement which took place here was in the nature of a compromise; an acceptance by one party, and a consent to pay by the other a gross sum in satisfaction of a disputed account. Whether the circumstances under which that settlement took place are such as to induce a Court of Equity to set aside the transaction, and direct a general or specific account, must depend on the particular facts of this case, which makes it necessary for us to go into those facts a little more in detail than we should otherwise have done.

Now, the facts appear to be these: Previous to 1831, the Appellant carried on business as a merchant tailor and clothier in *Calcutta*, under the name or firm of "*Robert Gibson* & Co." In the month of *January*, 1831, he agreed to admit into partnership with him two persons of the names of *Wallace* and *Leslie*, who had previously been his assistants in the business, a circumstance not wholly immaterial, because it shows that those persons were probably well aware of the nature of the business, and the mode in which the transactions of that business were carried on both by the *London* and *Calcutta* houses. The terms of that partnership were not reduced into writing at the time it commenced, and it was not until *May*, 1832, that articles of partnership were executed. By those articles of partnership, (after reciting the agreement

which had been made for a partnership to commence at the beginning of 1831,) it was stated, that a valuation had been made of the shares, of which these new partners were to have one-fourth each, and that a joint and several Bond had been given with the consent of the Appellant, *Henry McKellar*, for the amount which was due in respect of those two fourth shares, and a period of four years was to be allowed for the payment of the sum, amounting altogether to Rs. 112,500. It further appears from this deed, that the Appellant contemplated retiring from the partnership, and introducing his brother, *Thomas McKellar*, into the concern, and going himself to *England;* and there was power reserved by the deed for the Appellant to make that arrangement; and it was further agreed, that in the event of *H. McKellar* disposing of his share and interest in the co-partnership, and proceeding to *England*, he should be the agent of the firm of "*Gibson, McKellar* & Co." in *Europe*, and that all sum or sums of money that should be remitted to any agent or agents in *England* should be remitted to him. But no stipulations were introduced into the deed either in respect of the remuneration which *H. McKellar* was to receive, or the duties he was to perform.

It seems that in *November*, 1832, *Thomas McKellar* did go out from *England*, when the Appellant's share in the partnership was transferred to him, and, in the same year, the Appellant returned to *England*.

Now, it appears from the old account, No. 1, which is in evidence, that previous to leaving *Calcutta* the Appellant settled with *Wallace* and *Leslie* the amount which was due to him, between himself and his partners, and at that time a balance was shown to be due of about Rs. 228,941.

On coming to *England*, the Appellant acted, as he

1853.
M'KELLAR v. WALLACE.

had agreed to do, as the agent for the new firm at *Calcutta*, and not only selected the goods that were to be sent to the *Calcutta* firm, but he himself paid for those goods, and it appears from the accounts, which are not disputed, that the advances he made in that respect were so large, that at the end of the year 1833 they amounted to £11,676, and at the end of 1834 they amounted to £20,685, and at the end of 1835 to about £29,000. Now, during the whole of that time invoices were sent of the goods that were thus furnished to the Respondents; invoices would, of course, be sent by the parties who supplied the goods, and, with a single exception, all those goods were supplied by the firm of "*A. McKellar* & Co." in *London*. Now, those invoices would, of course, show to the Respondents the amount of the goods which they were alleged to have received, and the amount of the invoice prices which were represented to have been paid for those goods. On the other hand, they would not show what charges the Appellant was supposed to make for the agency he performed on their behalf in *England*, or the allowances which he might make in respect of the sums that were charged in the invoice account. But, in the autumn of 1836, an account current was sent of all the dealings and transactions which had taken place in respect of that agency from the beginning; to what date does not distinctly appear; but at all events, it must have been up to the end of the year 1835. Now, that account would necessarily show everything: it would show what charges he made; it would show what allowances he made; it would show at what rate interest was charged, and at what rate commission was charged; and, as far as I can find in the course of these proceedings, no observation was made on the account so

rendered, either in the shape of approbation or disapprobation, until a period which I am about to mention. The parties go on in that way; *H.McKellar* continues to purchase goods, and to send them out, paying for those goods, until the month of *January*, 1838, and probably until a subsequent period; but it is only to the month of *January*, 1838, that it is necessary for us to apply our attention.

In 1838, according to the account made out by the Appellant, there was due to him on the old account, Rs. 228,941, and on the new account, or the purchase account, the sum of £36,169. These accounts were sent out to *Greenaway*, his agent at *Calcutta*, with directions to obtain a settlement, and with power to give a discharge for anything which might be paid in respect of them. With these accounts the Appellant sent a letter addressed to the Respondents, on which much reliance has been placed by the Respondents in their argument. It is to be observed, that in the account current there was this distinction; up to the month of *June*, 1836, and during part of that month, there is an allowance made by the Appellant for discount in all these accounts. What the distinct rate was, is not, perhaps, in all cases, very clear; we will take it at two-and-a-half per cent., as the Respondents allege that it was. But, from the end of *June*, 1836, there was no allowance for discount at all. Therefore, there was a difference in the discount allowed; up to *June*, 1836, a discount allowed, and no discount allowed after *June*, 1836. In 1838, *Greenaway* receives the accounts, accompanied by this letter to the Respondents, which contained this passage. "I have now the pleasure to forward copy of your account current, to which I do

1853.
M'KELLAR v. WALLACE.

not anticipate any objection." It is clear, therefore, that there had been some previous correspondence and discussion between these parties with respect to the result of these accounts. With respect to this dealing, he says, he sends these accounts, and the letter then goes on to say that, "the discounts have been shown where allowed in the account rendered. You will observe from the last shipment, in *June*, 1836, no discount has been allowed, the whole of the goods having been purchased for cash, and consequently none allowed, as also in the account of *Brickwell* & *Moore*, enclosed in mine to you of last month."

Now, it is said that this is an incorrect representation by the Appellant, and is in fact equivalent to saying, You will find in this account the whole amount which I have received for discounts allowed. Why, it is quite obvious that it is no such thing. The character of that statement is this, as has been urged by the Respondents' counsel. In part of the account there is discount allowed, in another part of the account discount is not allowed; where discount is allowed you will see it in the account, and where none is allowed, it is stated that he had received none.

These accounts, together with a letter dated the 26th of *April*, 1838, are sent by *Greenaway* to the Respondents; a letter proposing and urging a settlement, and offering to correct any errors or omissions that may be found in them.

Now, what takes place upon this? The Respondents had known in 1836, or in the beginning of 1837, when they received this account current, the principle upon which this gentleman was making out his account, the amount on which he charged interest;

the rate at which he charged interest; the rate at which he charged commission, and the rate at which he allowed discount. It is very true they did not know by that account, either in 1836 or in 1838, what the amount of discount was which the Appellant himself had received; but having these accounts rendered to them, they object; and what is their objection? Why, at first it did not very distinctly appear what the particular grounds of their objection were; but *Greenaway* says, Well, if you are dissatisfied with this account, render me an account as you say it should be made out; an account with the items which you say it ought to contain. They do make out what they say the account ought to be, and they charge the Appellant, and debit the account with discount at seven-and-a-half per cent. upon every purchase, introducing into the account the corrections that would result from that deduction. It is perfectly true that the effect of that would be to alter every single item in the account, and that seems to have been the difficulty which was pressed upon the Court below, namely, that they could not consider it in any sense a settlement, when not only the balance might have been altered, but, when there was not one single item in the account which would not be altered, if the defence of the Respondents prevailed. Then what is the result of that account as made out by themselves? The result is this; that there is due on that account, instead of £36,000, a sum of £32,000 or £33,000, making, therefore, a difference of £3,000; and then how is that matter treated by these parties? Why, they say this, Here is a balance which we must admit to be due from us, at all events, to the amount of Rs. 491,695, and if you will give us time for the

1853.
M'KELLAR v. WALLACE.

payment, we will consent, not only to admit that balance, but we will pay down Rs. 29,000 at once, and we will give security, by our Bond, for the payment of Rs. 400,000 by instalments, in four years, by a *lac* of rúpees in each year.

Well, it is said, this is not a compromise but a settlement. It is not very material which; the language, however, of the Bond, would rather seem as if it were in some sort a compromise, for it states, that in consideration that time shall be allowed the Respondents for the payment of that balance, it is agreed, to admit that Rs. 491,695 are due by them, but at the same time they say, that "whereas they have examined and investigated the several accounts of the said *Henry McKellar* with the said firm of *Gibson, McKellar* & Co., rendered by or on behalf of the said *Henry McKellar*, up to the 31st day of *January* last, and the said *Henry McKellar* having agreed to grant such time for payment as in the condition hereunto written, the said *William Leslie* and *John Wallace* have admitted the sum of Company's Rs. 491,695 14a. 3p." (showing the extreme minuteness with which they had made the examination), "to have been due and owing by the said firm of *Gibson, McKellar* & Co. to the said *Henry McKellar*, on the 31st day of *January* last, but have refused to admit the further sum of £3,757 15*s.* 1¾*d.* sterling of lawful money of *Great Britain*, claimed as due to the said *McKellar* until satisfied on further investigation and examination."

Now, is it possible that there could be a more solemn adjustment of an account, as far as that adjustment went? The account begins with an account in 1836; a subsequent account in *March*, 1838; a

discussion for nearly six months on those accounts; a final admission of Rs. 491, 695 being due, and an express reservation of an item of £3,757, not as a disallowed item, but as an item which at that moment had not been ascertained, but which might be ascertained and would be ascertained by further investigation and examination. Well, this Bond was given, and the amount, as it appears, paid.

Now, not very long after, namely, in the year 1839, *Leslie*, one of the partners, comes over to *England*. It appears that he brought with him a power of attorney for the settlement of the accounts; that it was a partnership matter that he had authority to deal with when he came to *England*, and which accordingly he did deal with. Now, observe, when he came to *England*, in what position these parties stood toward each other? There had been the fullest investigation and examination of these accounts, and the fullest time in respect of considering them in every point except one, and that point is one which cannot be cleared up at *Calcutta*, where *Greenaway* is the agent; it must be cleared up in *England*, unless the vouchers relating to those payments are sent over to *India*. *Leslie* comes over; he sees the Appellant, and no doubt he had the right then to say, Before I pay you a shilling of this £3,757, or give security for it, you, who are my agent, are bound to give me the whole of the information you possess; you are bound to produce the vouchers which show what discounts you have received; I shall then claim that I am entitled to be allowed upon the Indian account all the discounts you have received, which are larger than are credited, and, therefore, to have the account corrected, by reducing each and every item of the account, according to that reduc-

1853.
M'KELLAR v. WALLACE.

tion. That was his right, no doubt; but, on the other hand, if he thought fit, instead of insisting upon that right, he might say, Instead of going through these accounts; instead of comparing them; instead of ascertaining the balance which may increase or diminish that £3,757; if you are willing to strike off £1,200, and to accept the balance in full of all demands, I, on behalf of myself and my partner, am content to pay that sum, and I will give you my acceptance for the amount so reduced, and there will be an end of the transaction between us. Now, is it possible to conceive a more fair settlement of an account than this, as far as it had gone? A Bill of exchange at eighteen months is accepted, allowing abundant time for the partners in *Calcutta*, if they objected to the settlement, to object to it, and if they could set it aside, to set it aside. *Leslie* goes out to *India* again in the beginning of the year 1840, and what is the evidence? When he is communicating with his partner, *Wallace*, does *Wallace* say he had no authority to make that settlement? Does *Leslie* say, I was coerced; I was under apprehension; I was misled by the representations of the Appellant, and, therefore, the settlement is not to stand? *Wallace* is proved distinctly to have said, on more than one occasion, This is a settlement which has been made, a Bill of exchange has been given in respect of that settlement. If I had been dealing with you, Mr. *Greenaway*, I think I could have made a better settlement; that is, if I had been dealing with you, who have not the vouchers, I could have made a better settlement than with the Appellant, who has the vouchers; but a settlement has been made, and I suppose the Bill must be paid.

But it does not rest here. The Bill being given on

the 31st of *August*, 1839, does not become due until the 3rd of *March*, 1841. In the interval, these parties, who had previously been on the best terms appear to have quarrelled. Of course, we know nothing of this case except from what appears upon the facts and correspondence. They appear to have been under great obligation to the Appellant. Whatever their feelings previously had been, it is plain that a rupture had taken place, and feelings of the greatest hostility, to judge by the language of their letters, were entertained by the Respondents or by *Wallace*, the surviving partner, towards the Appellant. Independent of the account to which I have referred, the *Calcutta* firm had acted as the agents of the Appellant in collecting and getting in the debts due to him as representing the preceding partnership, and he makes repeated applications for an account of their receipts, in respect of that collection. In *October*, 1840, more than twelve months after that Bill had been given, they write him a letter in which they say, "We will not render you any account at all; we will not give you one shilling we have received from you, until you settle our outstanding claim against you." *Greenaway* writes, "What have you, as agents, collected? Do give me a notion." That is, what is due to the Appellant. They send him a letter enclosing a rough note of their claims, and neither in that letter, nor in the rough note from beginning to end, is there the slightest allusion to the settlement which had taken place in *England*.

The Bill becomes due in *March*, 1841; it is dishonoured, and an action is brought on the 14th of *March*, 1841. Now, what is the course the Respondents take? They defend the action at law; they

1853.
M'KELLAR v. WALLACE.

obtain a commission for the examination of witnesses in *England*, and by that means they suspend that action from the month of *March*, 1841, to the month of *February*, 1842. That commission was never returned, an application was made with success to set down the cause for trial, and a verdict was then obtained in 1843, which the Plaintiff was manifestly entitled to in 1841; and then a few days afterwards they resort to what used to be, and I presume still is, the resource of desperate debtors; namely, having failed at law, they file a bill in equity, imputing all manner of fraud in the accounts or in the settlement of the accounts, and in obtaining the Bill of exchange by the Appellant, and they pray for a general account, for an injunction, and for the delivery up of the Bill of exchange to be cancelled. To that bill the Appellant put in his answer; and what is the result of that answer? It has been read very fairly on both sides; there is no question upon the facts, but there was no evidence in favour of the Respondents, except upon that answer; and the result of it is this: the mode in which I have stated this account is, that from 1833 to 1834, I received no discount; from 1834 to 1836, I received discounts at rates varying from five per cent. to two-and-a-half per cent.; from 1836, I received no discount at all, in the name of discount; but I received a *del credere* commission at the rate of two-and-a-half per cent. Now, he says, I insist upon this, that not only according to mercantile usage, these were fair and reasonable charges, such as I was entitled to make, but if the accounts had been made out according to ordinary mercantile usage in such cases; if I had drawn upon you for the purchasers instead of supplying you for

four years, at least, with the whole amount of capital by which your business was carried on; instead of being in your favour, I believe the account would have been £8,000 or £10,000 more against you than it is.

Then it is said, that this is a case in which the transaction whereby the account was settled by the delivery of the Bill of exchange for Rs. 30,744 is to be set aside. On what possible ground is it, that this transaction is to be impeached? As I understand the judgment in the Court below, the Chief Justice, at the original hearing, or rather the re-hearing, seems to have entertained this opinion. He says, this cannot be a settled account, because one item was reserved for subsequent verification. (And if he took it on the Bond, so it was, but if he took on the Bond and the Bill of exchange together, then is it not a settlement?) I ascertain the amount to the extent of Rs. 491,695; there is another item which I cannot ascertain—I am content, both parties are content—not to have that, but that one party shall make an allowance, and the other party shall accept an allowance, and, accordingly, it is settled on that footing.

I confess, therefore, I cannot understand exactly upon what ground it was that the Court held that these accounts between the parties were not closed. The Chief Justice, in the note which he has sent of the grounds of his judgment on the re-hearing, states only the objection which arises from the nature of the Bond, as well as from the nature of the settlement, which is succeeded by the Bond, but he does not advert to the Bill of exchange at all. When Mr. Justice *Colvile* comes to give what I quite agree with the Respondents in saying is such a judgment which, as far as clearness in expressing the grounds upon which

1853.
M'KELLAR v. WALLACE.

it rests is concerned, one would expect from him, he overrules the exceptions; but when he comes to deal with it, he seems to feel a little embarrassed by the form of the decree.

It is not necessary for us to consider that further, because we are clearly of opinion, that the transactions here are closed, the settlement being such as in our opinion was conclusive against all parties concerned, and the result being such, this bill cannot stand, and the Court, instead of making either of the decrees it made, ought to have regarded those accounts as settled, and ought to have dismissed the bill with costs, as far as it sought any account of the transactions included in those accounts, and so far as it sought to have the Bill of exchange delivered up to be cancelled.

The only point on which we have entertained some doubt, if any arises, is this: it is quite clear, that if the Appellant was right at the re-hearing, the second decree could not have been justified in our view of the case, any more than the decree which was made at the original hearing; and, therefore, up to that time he must have the costs, so far as they relate to that proceeding. But then comes the question as to the costs of the proceedings in the Master's office? Now, we are by no means bound to hold, that in all cases where the Defendant succeeds, he is to have the costs of the hearing; provided that the judgment is only to dismiss the bill. The Court directs an inquiry, by means of which inquiry the Plaintiff thinks by further evidence he can succeed in substantiating his case, and accordingly he goes into the Master's office and produces that further evidence. Of course a vast deal of expense will necessarily attend the operation,

and the consequence is, that usually we are by no means disposed to hold that the Defendant is to be compelled to pay costs because he should in a doubtful case have appealed to this Court and have succeeded in an appeal against the original decree.

But this case is very peculiar in its circumstances. The objection which the Court seems to have taken was not to the nature of the evidence, but it was an objection which, if it prevailed at all, could not be removed in the Master's office. If it be decided tha there was not a settlement of the accounts after the execution of the Bond, I think the Chief Justice was right in thinking, that the accounts could only be settled by the verification and ascertainment of each particular item: therefore, nothing that was done in the Master's office could ever remove that objection, and, consequently, it was not a case in which the Appellant could say, I have got, I think, a very good case, but I can make it better by going into the Master's office. If he had got a case that was good at all, it was as good at the hearing as it ever could be made. But there is this; and we very much agree with Mr. Justice *Colvile* in his luminous judgment on that point, that even if the accounts had been gone through in the Master's office, they would probably have been the same, or (if we can form a conjecture) rather more in favour of the Appellant than at present; because it is clear, those accounts must be taken as proof of the goods delivered and the invoices had for them, and as proof of everything, except the item which, it is said, remained outstanding, and the amount of which would possibly increase the claim on the other side, beyond the Rs. 491,695. Now, it appeared to the Appellant to be more to his

1853.
M'KELLAR v. WALLACE.

advantage to adopt the course of getting the account settled under the Decree, whether right or wrong, and he, therefore, goes in before the Master. He first gets a separate report, which probably it would have been difficult for the Master to have made in favour of the Appellant, having regard to what had been done by the Decree; but the Court having overruled the exceptions to that report, and told him that probably the result in the Master's office would be the same, he proceeds again under that Decree; but instead of working it out to the end, and trying what the result would be in that view of the case, in the middle of those proceedings he turns round and says, No, I do not think this is taking a favourable course; at all events there will be great delay and great expense; and now I will appeal against the Order made on the exceptions, and against the original Decree; and he makes a substantive application to this Court for that purpose. Now, it appears to us, under these circumstances, he had one of two courses to pursue—either to proceed under the Decree and work it out in the Master's office, or to appeal against the Decree, which if wrong at all, was wrong altogether.

Upon the whole, therefore, it is not necessary to refer to the cases which have been alluded to, where, without granting the specific relief, a Court of Equity granted a relief, which, it was admitted, if applied to another state of circumstances, would be wholly improper. The Order we shall humbly advise Her Majesty to make, will be, to vary the original Decree, by declaring that the accounts referred to, and included in the Appendix to this case, were settled by means of a Bond and the Bill of exchange, and ought not to be disturbed; and, that the bill, so far as it seeks an

account in respect of such transactions, and that the Bill of exchange should be given up, should be dismissed with costs, such costs to include the costs of the re-hearing; but that the Appellant ought to pay the costs of the proceedings in the Master's office with respect to the portions of the bill so ordered to be dismissed. No costs of the appeal.

The report of their Lordships, which was confirmed by Her Majesty in Council, was as follows:—

"The decree of the Supreme Court of Judicature at *Calcutta*, dated the 22nd of *February*, 1848, ought to be varied by omitting therefrom that part thereof whereby it was referred to *William Peter Grant*, Esquire, the Master of the Court, to take an account of the dealings and transactions between the parties in the original and cross suits, and whereby it was directed, if, on taking such account he should find any settled account or accounts, to take the account on the footing of such settlement, with liberty to either party to surcharge and falsify such settled accounts, and whereby it was directed, that if it should appear that any balance of the accounts prayed by the original bill was carried forward into any account subsequently settled, then that he might take the account prayed for by the original bill, on the footing of such settlement, with the like liberty to either party to surcharge and falsify, and that in lieu thereof it ought to be declared and decreed as follows (that is to say), that the accounts, included in the documents, No. 1, 2 & 3, delivered by *Greenaway* to *Gibson* & Co., were settled by the Bond and Bill of exchange in the pleadings mentioned, and that the accounts ought not to be disturbed, and that it ought to be referred to the

1853.
M'KELLAR v. WALLACE.

Master to take an account of the dealings and transactions between the parties in the original and cross suits, having regard to their Lordships' declaration. And, that it ought to be further ordered, that the bill filed by *Wallace* and *Spence*, as far as it seeks relief in respect of the transactions comprised in the accounts No. 1, 2 & 3, and so far as it sought that the Bill of exchange ought to be cancelled, and so far as it sought an injunction in respect of the same, be dismissed with costs, including therein the costs of the re-hearing, and, it appearing that the Appellant has proceeded in the Master's office, under the Decree in respect of the matters included in the accounts, their Lordships recommend that the Appellant, under the special circumstances of this case, be ordered to pay the costs of such proceedings; and the costs payable to the Appellant, and the costs payable by him, are to be set off, the one against the other, and the balance to be paid to the party entitled to the same; and their Lordships do further recommend that the case be remitted to the Supreme Court of Judicature at *Calcutta*, to give effect to the foregoing declaration, and that both parties bear their own costs of the appeal to your Majesty in Council."

KADIR BUKHSH KHAN - - *Appellant,*

AND

MUSSUMATAIN FUSSEEH-OON-NISSA AND MOOBARUK-OON-NISSA - } *Respondents.**

On appeal from the Sudder Dewanny Adawlut, North-Western Provinces, Bengal.

21st June, 1853.

A claim to a moiety of *mafee* and other *zemindary* property under alleged deeds of gift and relinquishment by a deceased Mahomedan widow, and her daughter, (a married woman;) and two unmarried grand-daughters, in favour of her husband, dismissed: the Judicial Committee (affirming the judgment of the Courts in India) holding, that the deeds were forgeries, and decreeing, as in a case of intestacy, that the grand-daughters were entitled by the Mahomedan law, as coparceners, to three fourths of the estates in question, and the father to the remaining fourth.

The effect of an Order of the *Fowjdarry* Court, giving possession of real estate, is merely to prevent the occupation being disturbed by violence, and confers no right or title on the party put in possession.

THIS appeal arose out of a disputed claim to the possession of a moiety of the *mafee* and *zemindary* of *Mouza Dubhur*, commonly called *Gurhee Mean Bhaee Khan*, in the *Pergunnah Pindowlee*, and other villages, lands, and houses in the District of *Saharunpore*. The Appellant was in possession of the lands at the date of the suit, and had been so for thirty years.

The Respondents were the daughters of the Appellant, and they claimed the moiety as coparceners by right of inheritance from their mother. The Appellant's title to the property was founded upon a deed of gift, alleged to have been executed by his mother-in-law, *Mussumat Vizier-oon-Nissa*, the mother of his

* Present: Members of the *Judicial Committee*,—The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

1853.

KADIR BUKHSH KHAN v. MUSSUMATAIN FUSSEEH-OON-NISSA.

deceased wife, *Oomdut-oon-Nissa*, and maternal grandmother of the Respondents, and two deeds of relinquishment alleged to have been executed by his wife and his two daughters in confirmation of such grant. The Respondents denied his title, and impeached the deeds as forgeries. They accounted for the fact of the Appellant's long possession, from the circumstance that they, and their mother and grandmother before them, were secluded, by the custom in *India* regarding females, from society, and that the Appellant acted as their manager.

The only question raised by the appeal was the validity of the deeds relied upon by the Appellant, which were—First, The deed of gift alleged to have been executed by *Mussumat Vizier-oon-Nissa*, dated the 9th of *March*, 1833, by which the property in dispute was alleged to have been conveyed to the Appellant. Secondly, a deed of renunciation, dated the 19th of *January*, 1834, alleged to have been executed by *Oomdut-oon-Nissa*, her daughter, of her interest in such property. And thirdly, a deed of renunciation to the same effect, dated the 11th of *April*, 1839, alleged to have been executed in the Appellant's favour by the Respondents. He also set up a title under the Mahomedan law, as the husband surviving the deceased, *Oomdut-oon-Nissa*, to a fourth share in her estates. This latter claim was not in dispute.

The facts of the case were as follows:—

Shurf-ood-deen Hosein Khan, the maternal grandfather of the Respondents, was, at the time of his decease, seised and possessed as *Mafeedar* of a moiety of the *mafee*, *zemindary*, and other lands and property. At his death his widow, *Vizier-oon-Nissa*, the

Respondents' maternal grandmother, succeeded by inheritance to the whole of his estates, and her name was registered in the Collector's office as the sole proprietor; she died in *June*, 1833, leaving an only daughter, *Oomdut-oon-Nissa*, who, at the time of her mother's decease, was married to the Appellant. There was issue of such marriage two daughters, the Respondents. *Oomdut-oon-Nissa* succeeded by right of inheritance to the whole of her mother's estates, and her name was in the first instance registered in the Collector's office as the sole proprietor of such estates, but afterwards her name was registered jointly with that of her eldest daughter, *Moobaruk-oon-Nissa*, with whom she continued in the joint seisin and possession till her death, which event happened on the 2nd of *August*, 1838, when the Respondents, by the Mahomedan law, became jointly entitled as coparceners to succeed to the estates of their mother.

In accordance with a *Fowti-namah*(*a*) submitted to the Collector by the *Canoongoes* and *Tahsildar* of the Districts in which the estates were situate, the Respondents' names were registered in the Collector's office as the heirs of their mother. This registration as well as of their mother's title was effected by the Appellant. The Appellant soon after married again, and then, for the first time, he set up a claim to the *mafee*, *zemindary*, lands, villages, and houses of the late *Visier-oon-Nissa* by virtue of the alleged deed of gift of the 9th of *March*, 1833, and took forcible possession of the property in question.

The Respondents, in order to protect the estates

(*a*) Report of the death of a party, and the name of his heirs.

1853.

KADIR BUKHSH KHAN v. MUSSUMATAIN FUSSEEH-OON-NISSA.

and to prevent disturbance and affray, presented a petition to the Judge of the *Foujdarry* Court of the *Zillah*, complaining of these acts of the Appellant. A petition was at the same time presented by the Appellant to the same Judge, in which he set up his title, and declared that he was and had been in possession in virtue thereof for many years. Upon these petitions coming before the Judge, he ordered the Appellant's name to be recorded as the present occupant of the estates. The Respondents appealed to the Sessions Court from this order, when the Sessions Judge decided that in consequence of the *Foujdarry* Court being limited in its inquiry to present occupancy, he had no alternative but to pass an order affirming the order of the magistrate appealed from, referring the Respondents to a civil Court to obtain possession.

In consequence of this order, the Respondents filed a plaint in the *Zillah* Court of *Saharunpore*, against the Appellant, to obtain possession of the estates, and for the appointment of a receiver pending the suit.

The Defendant, by his answer, objected to the competency of the suit, contending that, according to the provisions of sec. xix. Reg. II. of 1808, and Schedule B, Reg. X. of 1829, the Plaintiffs ought to be nonsuited for having omitted some portions of the ancestral property, and also in not having included the mesne profits, and properly assigned the valuation of the property; and he further, by his answer, submitted, that if the claim made by the Plaintiffs was true, he, the Appellant, was entitled, by the Mahomedan law, to a fourth part of the disputed property. He further pleaded, in bar to the Plaintiffs' claim,

that they were not entitled to sue, as he had been in possession for upwards of thirty years, and that the suit was barred by the Regs. of Limitation, II. of 1803, sec. xviii., and II. of 1805, sec. iii. And he further set up an adverse title, alleging that *Vizier-oon-Nissa*, being a widow, and having no offspring, except *Oomdut-oon-Nissa*, constituted him her son, and put him in possession and seisin of the entire property, more than thirty years ago; and that she subsequently, on the 9th of *March*, 1838, executed a deed of gift of the whole of the property in his favour, and that on the 19th of *June*, 1834, *Oomdut-oon-Nissa* executed a deed of relinquishment of her rights in the same, and that subsequently the Plaintiffs, on the 11th of *April*, 1839, executed a similar deed of all their title on the property, which they relinquished in his favour.

To this answer the Plaintiffs filed a replication, denying generally the allegation that the Defendant had been thirty years in possession, asserting also the illegality of the Defendant's possession, and that it was obtained by fraud; and they insisted that the alleged deed of gift and the deeds of relinquishment relied upon by the Defendant in his answer were forgeries; and they amended the description of the particulars of the property sued for, and set out a list of the same, offering to file a supplemental plaint if the Court should so direct.

The plaint was afterwards further amended by setting forth a full specification, and value of the property claimed, and upon the proceedings coming before the Principal *Sudder Ameen*, that Judge considered that the issue of the case turned upon the

1853.

KADIR BUKHSH KHAN v. MUSSUMMAUT FUSSEEH-OON-NISSA.

questions—"Whether in truth *Vizier-oon-Nissa* made a gift of this property to the Defendant, and whether *Oomdut-oon-Nissa*, the daughter of *Vizier-oon-Nissa*, and, after her death, whether the Plaintiffs, the daughters of *Oomdut-oon-Nissa*, made deeds of relinquishment in favour of the Defendant?" And ordered both parties to produce documentary proof to prove their allegations.

Both parties filed the documentary evidence called for by the Court, and witnesses were examined by them, who established the Plaintiffs' claim as coheiresses to *Oomdut-oon-Nissa*. The Defendant put in evidence the alleged deed of gift; which appeared to be witnessed by nineteen persons, and although the Court called upon him to produce them all for examination, he tendered and examined only five of such witnesses. He also filed the deeds of relinquishment alleged to have been executed by the late *Oomdut-oon-Nissa* and the Respondents, and produced fourteen witnesses in further support of his claim. Three of the witnesses produced by him were the *Canoongoes* or District Registrars, who superintend all transfers, and keep the lists of the owners of land. Three other witnesses deposed that they had attested the deed of relinquishment by *Oomdut-oon-Nissa*, and three more that they had witnessed the acknowledgment by the Respondents of the deed by which they were alleged to have relinquished all claim in favour of the Appellant. He also examined witnesses to prove that he had been in possession of the property for more than thirty years.

The case came on for hearing on several occasions before the Principal *Sudder Ameen*, and on the 16th

1853.

KADIR BUKESH KHAN v. MUSSUMATAIN FUSSEEH-OON-NISSA.

of *August*, 1843, that Judge pronounced the Court's decree, and, after going into a long and careful examination of the whole of the evidence in the cause, declared that the deed of gift by *Vizier-oon-Nissa*, under which the Appellant alleged that the property had been conveyed to him, and upon which he rested his claim, and also the alleged deed of relinquishment by *Oomdut-oon-Nissa*, which rested upon that deed, and the alleged deed of relinquishment by the Respondents, were forged and fabricated documents; and, after further declaring that the Plaintiffs' defence to the suit from length of possession was untenable, the decree proceeded as follows:—"It is certain that in the first instance the name of *Vizier-oon-Nissa*, the maternal grandmother of Plaintiffs, was borne on all the Collector's records; on her death the name of *Oomdut-oon-Nissa* was recorded, and on her demise the names of the Plaintiffs were entered on the records of the Collector; that during her lifetime, *Vizier-oon-Nissa* was in possession; that on her death *Oomdut-oon-Nissa* held the property, and on her death the Plaintiffs have been seised in proprietary right of this property; that the Plaintiffs prosecuted their rights in the Resumption Office, and it was in their favour that the estates were released and confirmed in *mafee*. Thus then in every view of the case the title of the Plaintiffs to this property is fully shown. The Plaintiffs claim the whole of this property by right of inheritance from *Oomdut-oon-Nissa*, but under the Mahomedan law a fourth share in the estate of *Oomdut-oon-Nissa* passes to the Defendant; leaving, therefore, this fourth share in the possession of the Defendant, the Plaintiffs are entitled to possession of the remainder; and with reference to the circular order of

1853.

KADIR BUKHSH KHAN v. MUSSUMATAIN FUSEEEH-OON-NISSA.

11th of *January*, 1839, the Plaintiffs are entitled to three-fourths of the profits of the estates, whatever they may be, to be paid by the Defendant."

Against this decree, the Appellant appealed to the *Sudder Dewanny Adawlut* for the North-Western Provinces. The case came before Mr. *Benjamin Tayler*, one of the Judges of that Court, who, on the 6th of *May*, 1844, ordered that the *Zillah* Court of *Saharunpore* should make a report, stating when the stamp paper on which the deed of gift was engrossed was despatched from *Calcutta*, when it reached the *Zillah*, and what was the practice in *Calcutta* in stamping paper. On the case being again brought before that Judge, the proceedings of the *Zillah* Judge, dated 21st of *June*, 1844, accompanied by a report of the Stamp *Darogah*, was produced. This report was to the effect, that no stamp of Rs. 8 value was despatched from *Calcutta* before the month of *September*, 1832. Upon this further evidence, Mr. *Tayler* dismissed the appeal, in the following terms:—"From the report of the Collector, it is clear that the endorsement of the sale of the stamp paper is a fabrication, as the paper was not despatched from *Calcutta* before the month of *September*, 1832. Under the above circumstance, and with reference to the other grounds of the Principal *Sudder Ameen's* decision in support of the forgery, I dismiss the appeal, affirm the decision of the Principal *Sudder Ameen* of *Zillah Saharunpore*, dated the 16th of *August*, 1843, and award the costs of both Courts, with interest from the date of the decree to the day of payment, against the Appellant."

From this decree the present appeal was brought, and now came on for hearing.

The case was argued by

Mr. *Roupell*, Q.C., Mr. *Forsyth*, and Mr. *Maule*, for the Appellant,

Who contended, that there was not sufficient evidence in the cause to warrant the conclusion the Court had arrived at, that the deed of gift by *Vizier-oon-Nissa*, and the deeds of relinquishment by *Oomdut-oon-Nissa*, and the Respondents, in the Appellant's favour, were forgeries; and they relied upon the fact of the Appellant being in possession of the estates as strong evidence of right, as immediate seisin was necessary by the Mahomedan law to give validity to a deed of gift (*a*), and insisted that the burden was upon the Respondents to establish the forgeries imputed, and that the Appellant ought not to be called upon to rebut such a charge without substantive evidence of the forgeries being given. They referred, upon the question of the duties of the *Canoongoe*, to Ben. Reg. IV. of 1808; to the effect of the *Cazi's* seal to a deed, to Ben. Reg. XXXIX. of 1793; and, with regard to the stamp affixed to the deed being of a different date to the day of the alleged execution, to Ben. Reg. X. of 1829.

Mr. *Wigram*, Q.C., *Mr. Lloyd*, Q.C., and Mr. *Edmund F. Moore*, for the Respondents, were not called upon by their Lordships;

Judgment being delivered, as follows, by

The Right Hon. T. PEMBERTON LEIGH:

We do not think it necessary to trouble the Re-

(*a*) Macnaghten "On Moohummedan Law," p. 50.

1863.

KADIR BUKHSH KHAN v. MUSSUMAYAIN FUSSEEH-OON-NISSA.

spondents' Counsel to address us. This case comes before us on an appeal from the Courts in *India* upon a mere question of fact; upon which both the *Zillah* Court and the *Sudder* Court concurred, without any doubt or hesitation, in establishing the title of the Respondents as heirs of their mother; and, unless it could be made out perfectly to our satisfaction, that upon such a point the Court below had miscarried in some obvious particular, we should never think of reversing the judgment, or of remitting it for further inquiry. But, in truth, we cannot entertain the slightest doubt upon the case.

The facts are these. It is admitted on all hands, that the grandmother of the present Respondents, *Vizier-oon-Nissa*, was, up to the year 1833, the registered owner of the property which is now in dispute. She died in *June*, 1833. Upon her death she left a daughter, *Oomdut-oon-Nissa*, an only child, who was the wife of the present Appellant, and her name was entered upon the registry of the Collector as the owner, in her character of heir to her mother, and that is stated to have been done by the procurement and with the consent of the Appellant. *Oomdut-oon-Nissa* died in the month of *August*, 1838, and upon her death an inquiry took place, and a *Fowti-namah* made by the *Canoongoes* of the Districts where the estates were situate, describing the property, stating the death of the preceding owner, and the inheritance by her daughters, was produced to the Collector, that document being made out by those very *Canoongoes*, or at least, if not by all, certainly by one or two of them, who now come forward to swear that they were witnesses to the deed by which these ladies were debarred of their title to this property.

They are entered upon the register as the owners, under these circumstances, and this is also represented to have been done with the consent and by the procurement of the Appellant.

In 1839, the Appellant either contracts another marriage, or at all events he introduces what is called a strange lady into the family, and thereupon a dispute seems to have arisen; the daughters quit their father, and then, for the first time, a dispute arises as to who is the owner of this property. As long as the grandmother and the mother survived, and as long as the daughters lived with the Appellant, he would naturally and necessarily be in possession of this property. Possession is nothing at all, in these circumstances. Possession is just as consistent with the title of his wife's mother, and of his own wife and of his daughters, as it is with his own. Now, what takes place? In 1839, upon this rupture, there is an attempt by the one side or the other to take possession of these estates by violence. That is brought before the *Foujdarry* Court, which is simply a Police Court, and which so far deals with the possession that it prevents the occupation being disturbed by violence. An investigation then takes place upon several occasions before several judges, and possession is awarded to the Appellant, because he was then in possession, and the Respondents are distinctly told, as they obviously would be, that the possession is in the Appellant; and the Judge makes an order, "that he shall not be disturbed in his possession by violence, but if the daughters had the title to substantiate, which they appeared to have, they must proceed in a civil Court for the purpose of establishing it." They do proceed in a civil Court, and then for the first time

1853.

KADIR BUKHSH KHAN v. MUSSUMATAIN FUSSEEH-OON-NISSA.

after the dispute has arisen, and after it became obvious that these parties were to have recourse to a civil Court, a document appears, to which I will presently advert. Observe, that from the first period of these disputes, although the possession only was in question, it was quite obvious that the persons who had the title would necessarily, or very naturally, when the title is claimed by the opposite party, state their title. The Court says, I cannot look at that; the possession is now the only question, and, therefore, if your title is not clothed with possession, you must go to another Court to establish that title. But at all events, up to this period, not one word is heard of any one of those deeds beginning in 1833 and ending in 1839.

Now, in the proceeding which takes place before Mr. *Muir* and in which allusion is made to the deed of gift of 1833, we find the statement, "that on a former occasion, in consequence of a petition, dated 26th *September*, 1832, being presented by *Vizier-oon-Nissa*, a *Perwannah* was issued to the *Tahsildar*, directing him to prevent interference on the part of *Kadir Bukhsh Khan*;" that is, on the part of the Appellant. Now, the case which he set up in 1840, in his answer which he alludes to now by anticipation, is this—he says: "On the 9th of *March*, 1833, a deed of gift had been made to me by *Vizier-oon-Nissa* of this property." Therefore, this is the way in which the deed of gift is spoken of in the instrument to which I am now referring. In the first place it is stated, that *Vizier-oon-Nissa* had applied to the Court on the 26th of *September*, 1832, and had obtained an order to the *Tahsildar*, directing him to prevent interference on the part of the Appellant. It does not seem that the terms on which these parties

were living were such as to make it very improbable that at that time, at all events, or immediately about that time, such a deed as this would be executed. But, it goes on—and this which I am now about to read is the representation of the *Mokhtar* of the Appellant —"that he (the Appellant) had been for a long time possessed and seised of the *mafee* and *zemindary* estates," and that he "had been the proprietor of a moiety of the estates for upwards of twenty-six or twenty-seven years under a deed of gift from *Mussumat Vizier-oon-Nissa*, deceased." Now, this is the first allusion which we have to this deed of gift, and according to this statement it must have been dated twenty-six or twenty-seven years before. If such a deed of gift as that had been executed, of course it would have borne date somewhat about the year 1814 or 1815. This is the only allusion which we have to this deed of gift until we find it set up in the answer of the Defendant, where instead of being dated twenty-six or twenty-seven years before, it is stated to b dated the 9th of *March*, 1833, about seven years before the period at which these parties were in dispute.

Now, the circumstance which takes place upon the death of *Vizier-oon-Nissa* appears to be entirely inconsistent with the title which is set up on the part of the Appellant. On the death of *Vizier-oon-Nissa*, instead of entering his own name, the name of his wife is entered upon the Collector's books; and the ground which is stated for that in the deed of the 11th of *April*, 1839, is this: "On the death of *Mussumat Vizier-oon-Nissa*, the father of the declarants, moved by love and affection, caused the name of *Mussumat Oomdut-oon-Nissa*, his wife, to be inserted in the *fowti-namah* of the deceased, which was submitted to

1853.

KADIR BUKHSH KHAN v. MUSSUMATAIN FUSSEEH-OON-NISSA.

the Collector." But if you compare that with the statement which is contained in the deed of relinquishment from *Oomdut-oon-Nissa*, the reason which he there assigns for it is, that "*Vizier-oon-Nissa* died leaving the *Khan* proprietor, and that the *Khan*, in observance of ancient custom of the family, and also from motives of expediency, contemplates causing the registry of the name of the declarant in the office of the collector of this *Zillah* in the place of *Vizier-oon-Nissa* the deceased lady." The two representations are totally inconsistent with each other. Again, upon the death of *Oomdut-oon-Nissa*, the reason which we find assigned in this deed of relinquishment, of the 11th of *April*, 1839, is, that he became himself the owner and proprietor in consequence of the gift by *Vizier-oon-Nissa;* and it then goes on to state, that "Subsequently, *Mussumat Oomdut-oon-Nissa*, the mother of Plaintiffs, departed this life by the pleasure of the Almighty; and the father of the Plaintiffs, in consequence of the great love he bore to the deceased, was plunged into the depths of grief and sorrow, and contemplated retiring from the concerns of this transitory world. In this, his state, the names of declarants were inserted in the *fowti-namah* or *Oomdut-oon-Nissa*, deceased, which was submitted to the Collector." But, again, how is this consistent? The reasons assigned for the execution of these documents are utterly inconsistent with each other, utterly inconsistent with the position in which this party stood, utterly inconsistent with all probability, and all the usages which prevail in that country.

Now, when this deed was set up, this first instrument of 1833 was obviously the foundation of the whole title, because the subsequent instruments are

merely relinquishments, not grants, but an admission of the title of the Appellant, founded upon the original deed of 1833. They are not intended to confer, and do not express to confer, any beneficial interest then vested in the parties executing those instruments to the Appellant, but are a recognition by them of the interest previously existing in him. The whole case, therefore, rests upon the deed of 1833, which is first stated in the year 1840 to have been made twenty-six or twenty-seven years ago, and which, when it is produced, is expressed to have been made in the month of *March*, 1833. It is upon that document alone that the title of the Appellant must depend.

Now, when this deed was produced before the *Sudder Ameen*, (who seems to have investigated this case with very great accuracy, and to have given, as it appears to us, a very able judgment upon the matter,) the Defendants insisted that the deed was a forged deed, and amongst other proofs that it was forged, or at least that it was not what it purported to be, they said, upon this instrument is a stamp, which was not in use at the time when the stamp is alleged to have been granted. It is not as if that objection had been taken at the hearing of the cause without the attention of the other side having been called to it, for it appears by the proceedings, that on the 18th of *September*, (which I take to have been in the year 1841,) the Plaintiff's *Vakeel* put in a petition to the following effect, that the Defendant had put in a forged deed of gift. The stamp professes to have been purchased on the 19th of *July*, 1832, whereas on the 19th *July*, 1832, no stamp paper of Rs. 8 value was sold; and since the stamp was not sold by the Government officers on that date, the Defendant must

1853.

KADIR BUKUSH KHAN v. MUSSUMATAIN FUSSEEH-OON-NISSA.

have acquired the stamp by embezzlement, or the stamp must have been lost by Government, and on it the Defendant had fabricated his forged deed. Plaintiffs, therefore, pray that the stamp may be forthwith examined; that the register of stamp duties be called for by a proceeding, and that justice be awarded. Here in 1841, therefore, the attention of the Defendant is called to this circumstance, as affecting the genuineness of the deed; he is told, you have produced an instrument which purports to bear a stamp sold on the 19th *July*, 1832; and on the 19th of *July*, 1832, no such stamp as that was in existence; and they pray to have an inquiry. Accordingly, the deed was examined in the presence of the *Vakeels* of both parties, and an order was recorded, that as the record was under despatch to the *Sudder* Court, no inquiry could at present be instituted. Subsequently, it appears that an inquiry was instituted, and the Plaintiffs produce an extract from the register of stamp sales for the 19th of *July*, 1832, with the seal and signature of the Collector. The date of the stamp can nowhere be found in this document; indeed, it appears from the register that on that day no paper whatever of Rs. 8 value was sold, nor did *Vizier-oon-Nissa* purchase any stamp whatever on that date.

For these, amongst other reasons, to which we will presently advert, the *Sudder Ameen* was of opinion that this deed was a forgery. The case, however, goes up to the *Sudder* Court, and the Judge of that Court, Mr. *B. Taylor*, not satisfied with what had appeared before the Court below, thinks it necessary to have a further inquiry with respect to this stamp. It had appeared that by the list of the stamps sold on that day, that no stamp of Rs. 8 had been sold, and

no stamp whatever had been sold to *Vizier-oon-Nissa*; but it had not appeared whether at that time stamps of that character had been issued by the *Calcutta* Government; and for this reason he refers to the *Calcutta* issuer of these stamps, and from him a report is made, that no such stamp was issued at that time, and that none was despatched to this particular Province until the month of *September*, 1832. Upon this, he finds, from the report of the Collector, that it is clear, that the "endorsement of the sale of the stamp paper is a fabrication, as the paper was not despatched from *Calcutta* before the month of *September*, 1832."

Now, is it possible to say that these parties could require any further evidence with respect to this fact, whatever may be the nature of it, than this? They had a copy of the file of the Collector, which contains an account of the sale of stamps for the purpose of preventing the fabrication of instruments; they had the file of stamps sold on that day produced. No stamps of that value were sold at that time, and no stamp at all sold to *Vizier-oon-Nissa*. They had, in addition to this, the fact subsequently established by the Collector, that no stamps of that kind were issued at that date, and none were sent to that Province until the month of *September*, 1832.

But this is not the only ground upon which the Court below proceeds. The reasons which the *Sudder Ameen* assigns are these:—"First, the stamp paper on which the deed is written was manufactured in 1832–33; the stamp is stated to have been sold in *Saharunpore* on the 19th of *July*, 1832; it is, therefore, obviously absurd that paper manufactured in 1832–33 should have been sold in *Saharunpore* in 1832. Secondly, Plaintiffs have applied to

1853.

KADIR BUKHSH KHAN v. MUSSUMATAIN FUSSEEH-OON-NISSA.

the register of stamp sales for the 19th *July*, 1832, with the seal and signature of the Collector, and this exhibit appears as No. 263 on the file. The sale of the stamp can nowhere be found in this document. Indeed it appears from the register, that on that day no paper whatever of Rs. 8 value was sold, nor did *Vizier-oon-Nissa* purchase any stamp whatever on that date. Thirdly, the stamp was purchased on the 19th of *July*, 1832, while the deed of gift was engrossed on it on the 9th *March*, 1833, or nine months after the purchase. No reason appears why this stamp was purchased eight months prior to the making of the deed. Fourthly, the stamp bears an indorsement as follows:—'This paper is sold for the purpose of writing an agreement.' It is not stated that the stamp was sold for the purpose of writing a deed of gift. Then, after making other observations upon this document, and stating the number of witnesses, he says, 'these twenty-two are witnesses who appear on the margin.' The Defendant has caused the depositions of *Budder-ood-deen*, *Gholab Sing*, *Munsub Rai*, *Ghasee Ram* and *Kemee-ood-deen*, in all five witnesses, to be taken, and although directed to adduce the whole of the witnesses in the proceedings of the 27th *June* and 3rd *July*, he has not caused the depositions of the remaining witnesses to be taken. When the order to cause the testimony of the remaining witnesses to be taken was pressed upon the *Vakeels* of the Defendant, on the 9th of the current month, the Defendant's *Vakeels* distinctly declined. It is obvious, therefore, that if this deed was a true document, the Defendant would not have thus evaded causing the testimony of the other witnesses from being taken. Sixthly, of the five witnesses whose testimony the Defendant has caused to be taken, two witnesses,

namely, *Ghasee Ram* and *Munsub Rai*, are the *Canoongoes* of the *Mehal*. In the *fowti-namah* of *Vizier-oon-Nissa*, which was submitted to the Collector, with the *arzee* of the *Tahsildar* of the *Mehal*, dated 4th *April*, 1834, a copy of which *Hosein Bukhsh Khan* and *Shumshair Khan*, as Plaintiffs, have filed in their suit pending as No. 14,298, this identical *Ghasee Ram* and *Munsub Rai*, jointly with *Choonee Lal* and *Jewahir Sing*, *Canoongoes*, have distinctly mentioned the deed of gift alleged to have been made by *Vizier-oon-Nissa* in favour of *Hosein Bukhsh Khan* and *Shumshair Khan*, which deed was subsequently set aside by the Commissioner on an appeal by *Oomdut-oon-Nissa*." That was the document which was supposed by the Appellant's counsel to have been the deed of gift in question, in this case, but it is not. It then goes on to say:—"But of this deed of gift pleaded by the Defendant, which the witnesses declare was witnessed and sealed by them, no mention whatever is made in the *fowti-namah*. The *fowti-namah* of *Oomdut-oon-Nissa*, copy of which the Plaintiffs have filed in this suit, was also drawn out by these identical *Munsub Rai*, *Choonee Lal*, and *Jewahir Sing*, *Canoongoes*; but neither in this have the aforesaid witnesses made any mention of the deed of gift pleaded by the Defendant, but have stated that, on the death of *Oomdut-oon-Nissa* this property passed by inheritance to the Plaintiffs."

It appears to us, therefore, that even if there were no suspicious circumstances attaching extraneously to the instrument which is here relied upon, the whole circumstances of the case are so utterly inconsistent with the existence of any such document, and, that these transactions are so entirely inconsistent

1853.

KADIR BUKHSH KHAN v. MUSSUMATAIN FUSSEEH-OON-NISSA.

with what could possibly have taken place, if such a deed of gift had been executed, that the decision of the Court below is the correct one; and when we add to that circumstance the extreme suspicion and utter impossibility of its being a document such as it purports to be, and made and executed at the time at which it purports to have been, we think that the Court below could by no possibility have come to any other conclusion than that at which they have arrived, and that the appeal must be dismissed, with costs.

RAI SRI KISHEN - - - - *Appellant,*

AND

RAI HURI KISHEN - - - *Respondent.**

On appeal from the Sudder Dewanny Adawlut, North West Provinces, Bengal.

29th & 30th June, 1853.

Action by Bankers, against the representative of a deceased customer, to recover a balance of an account alleged to be due to the Bankers by the deceased at the time of his death, dismissed by the *Sudder* Court, no satisfactory proof having been given that such balance was due. Such finding sustained on appeal by the Judicial Committee.

The production of banker's books, with the entries of the items constituting the demand, kept according to the established custom of *Mahajuns* in India, is not of itself sufficient evidence to establish such a claim, strict proof of the debt being required.

THIS was a suit instituted by the Appellant, and *Rai Ram Kishen*, bankers at *Benares*, against the Re-

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, Knt., the Right Hon. Lord Justice Turner, and the Right Hon. Sir John Dodson, Knt.

spondent, as representing his father, *Rai Bunseedhur*, deceased, a customer of that bank. The object of the suit was to recover from the Defendant, as such representative, the sum of Rs. 42,416 12a. 6p., being an alleged balance upon a banking account, and claimed by the Plaintiffs to be due from the Defendant's father to the Firm, for loans, transactions, and managing an estate in which *Rai Bunseedhur* was interested.

The plaint was filed in the Court of the city of *Benares*, on the 18th of *February*, 1839, by the Appellant, *Rai Sri Kishen*, and *Rai Ram Kishen*, as Plaintiffs, and parties interested in the firm against the Respondent. After stating that various dealings had, from time to time, taken place between the Plaintiffs' firm and the deceased, *Rai Bunseedhur*, and that *Rai Bunseedhur* was in the habit of remitting the balances from time to time due, by *hoondies*, to their firm, the plaint alleged, that the deceased *Rai* visited *Benares* in *Kooar* 1895 *Sumbut* (A.D. 1837), when the Plaintiffs demanded payment of the balance due to them, and he promised to pay the balance on his return to *Patna*. That the deceased, after a short stay, returned to *Patna*. That about this time new books were about being opened in the Plaintiffs' *kothi;* and an account showing a balance due by the deceased to Plaintiffs on the 5th *Soodee Jeyt*, *Sumbut* 1895 (A.D. 1838), amounting to Rs. 42,416 10a. 6p., was made out as usual, and sent to the deceased, with a request that the amount so due might be remitted, and distinctly explaining that down to that time interest had been charged at the rate of 8 anas per centum per month, according to the practice of *Mahajuns;* but that as the money due on account had not been paid

1853.

RAI SRI KISHEN v. RAI HURI KISHEN.

when due, and since it had become necessary to urge their demand, notwithstanding which the money had not been paid, Plaintiffs had determined to charge interest for the time to come, without exception, till the money should be paid, at the rate of one rupee per centum per month, and that it behoved him to remit the sum due to Plaintiffs' *kothi* without delay. That in consequence of the *Rai* being sick, delay in sending the money demanded took place, and, without remitting it, *Rai Bunseedhur* died, in the month of *Sawun* (*July*, *August*, 1838) of the same year. That demands had been made at *Patna* upon the Respondent, the son and heir of *Rai Bunseedhur*, for payment of the amount with interest, which he refused to pay. The plaint then specified the amount claimed to be, according to the ledger balance dated *Jeyt Soodee* 5th, *Sumbut* 1895, as follows: principal sum, Rs. 42, 416 10a.6p.; and interest, Rs. 3, 817 8a., making a total of Rs. 46,234 2a. 6p.

The Respondent, by his answer, objected, first, to the jurisdiction of the *Benares* Court to entertain the Plaintiffs' claim, as he was a permanent resident of *Patna;* and that by Secs. 2 & 3 of Reg. XIII. of 1808, Sec. 7, Reg. III. of 1793, the suit ought to have been brought in the *Dewanny* Court of the *City* of *Patna*, and not in the *Benares* Court, and insisted that the Plaintiffs ought to be nonsuited on that ground. Secondly, he insisted that the Plaintiffs were not entitled to recover, as it appeared that, beyond the *buhi-khatas* (books), which were in their own control, they held no document nor proof of their claim; and, therefore, according to the Circular order of the *Sudder Dewanny Adawlut* of the 3rd of *August*, 1838, such a claim, unsupported by a deed executed

on a stamp, could not be entertained. Thirdly, that the Plaintiffs had vaguely stated their claim at Rs. 42,416 10a. 6p., but that it did not appear whether this sum was received at one time or by several payments, nor on what dates and in years, or whether the debits were for cash or otherwise: all which particulars the Plaintiffs had intentionally kept back. Fourthly, he denied the allegations in the plaint, that, on the death of *Rai Bunseedhur*, repeated demands had been made on him through the *gomashtah* of the *kothi* at *Patna*. Fifthly, that the father of the Plaintiffs was the ostensible proprietor of the *kothi*, while the names of the Plaintiffs were used as a fiction, and that while the real proprietor was living, a suit in the names of the feigned owners was directly opposed to Sec. 8, Reg. XXVII. of 1814, and the Circular order of the 27th of *July*, and the proclamation of the *Sudder Dewanny Adawlut* of the 25th of *September*, 1809. Sixthly, the Respondent submitted to the judgment of the Court whether, according to the Plaintiffs' statement, that, except the *buhi-khata*, they had no deed executed by *Rai Bunseedhur* or the Respondent for the principal sum, their claim for interest, which in the first instance was 8 anas per centum per month, and then, in consequence of default, was charged at the rate of one rupee per cent. per month, for which also they had no voucher, was tenable. Seventhly, that the allegation of the Plaintiffs, that the Defendant's father promised, in *Benares*, to pay the money, and that the account was sent to the Defendant's father, at *Patna*, was untrue, and the Defendant submitted that, as the Plaintiffs had no paper written or signed by the Defendant's ancestor, a verbal promise set up by the Plaintiffs was of no

1853.

RAI SRI KISHEN v. RAI HURI KISHEN.

avail; and he finally submitted that, if the Court should be of opinion that it had jurisdiction in the case, then that the Plaintiffs ought to be required to be explicit in the statement of the claim, furnishing an account embracing the several items from first to last, and the date and year of each; that these items should be compared with their books, over which they had full control; and that an answer should be taken from him touching each item, and that he, the Defendant, would produce his counter evidence to each fact.

A replication and rejoinder was filed. It is unnecessary to notice in detail the contents of these further pleadings, except that in their replication the Plaintiffs did not aver any acknowledgment of the account or balance by the deceased, but rested their claim to recover the amount sued for, solely on the entries made in the *buhi-khata* of the firm, which they alleged to be conclusive against the whole world, and to be the basis of all transactions, and that in all Courts the *buhi-khata* of *Mahajuns* was admitted and received as trustworthy.

At a proceeding of the Court held on the 12th of *September*, 1839, the *Vakeels* of the Defendant and the Plaintiffs were examined, and the Court declared the *onus probandi* in the suit was on the Plaintiffs, and it was ordered that the Plaintiffs should file a copy of the account current of *Rai Bunseedhur* with proofs of the items therein contained; also proof that in *Kooar Sumbut* 1894 (A.D. 1837) the father of the Defendant promised to pay the money, and that dealings in *hoondies*, &c., existed between them.

In consequence of this order, the Plaintiffs filed a copy of an account and examined witnesses. The ac-

count thus filed commenced with the year *Sumbut* 1892 (A.D. 1835–6), beginning with an item of Rs. 34,245 14a. to the debit of *Rai Bunseedhur*. At a proceeding of the Court on the 22nd of *November*, 1839, the Court took notice, that the accounts thus filed were not chronologically entered, and ordered that an account current of the above sum of Rs. 34,245 14a. should be filed. The Plaintiffs then filed an account current for the years 1889–1892 (A.D. 1832–1835), beginning with a balance of Rs. 20,043 14a. to the debit of *Rai Bunseedhur*.

On the 13th of *April*, 1840, the Court, after noticing that although the Plaintiffs had brought several witnesses, they had not produced evidence to the items in the account current, nor had brought their *buhi-khata* into Court for inspection, it was ordered that in three days they should put in their evidence to prove the items entered in the account current, and also should prepare abstracts of their accounts.

On the 16th of *April*, 1840, the Plaintiffs filed a petition, by which they submitted that the evidence already put in was sufficient evidence of the items, and presented the original account books; they also alleged that *Rai Bunseedhur*, on the 23rd of *July*, 1831, had executed a *rookah*, whereby he had acknowledged a balance as due from him of Rs. 20,401 15a. 6p. on the 16th of *March*, 1831.

By orders of the Court made in *September*, *October*, and *November*, 1840, *Ameens* were deputed to examine the books of the Plaintiffs, and report whether the same were regularly kept, and with such report to send an abstract of the several kinds of items. Pursuant to these orders, on the 5th of *February*,

1853.

RAI SRI KISHEN v. RAI HURI KISHEN.

1841, the *Ameens* made a report that the books of the Plaintiffs, according to the custom *Mahajuni*, were in every respect true and trustworthy. The abstracts thus furnished contained a digest of the items, showing that the demand of the Plaintiffs was principally constituted of sums not alleged to have been paid to *Rai Bunseedhur* himself, but to the Plaintiffs' father, *Rajah Putni Mull*, and to other third parties, for which it was alleged (though not proved) that *Rai Bunseedhur* was liable.

After some interlocutory proceedings and evidence, the Court, on the 12th of *July*, 1841, ordered the case to be tried with the aid of Assessors; who having been appointed, they, with the Court, investigated the case. The Assessors were of opinion that the statements in the plaint respecting the accounts were unsatisfactory, and that a supplemental plaint ought to be filed; and, by an order dated the 23rd of *May*, 1842, the Plaintiffs were directed to file a supplemental plaint containing an abstract of the accounts, that it might be seen on what ground the account rested, and from what date the transactions commenced, and under what dates the items claimed appeared.

In pursuance of this order the Plaintiffs filed a supplemental plaint. The Defendant, by his answer, insisted as before, that the Plaintiffs' own accounts were no evidence of their demand; that the other evidence adduced by them did not establish their case, and was unworthy of credit.

On the 28th and 29th of *July*, 1842, the *Vakeels* of the Plaintiffs and of Defendant were further examined by the Court. The general result of the evidence

1853.

RAI SRI KISHEN v. RAI HURI KISHEN.

was, that the Plaintiffs neither proved payment by them of the items with which they sought to charge *Rai Bunseedhur's* estate, nor established his liability for such items if really paid by the Plaintiffs. The evidence given of the *rookah* or acknowledgment of the 3rd of *July*, 1831, was unsatisfactory.

The Assessors differed in their view of the case. One was of opinion, that the Plaintiffs had entirely failed in proving their claim, and that they ought to be nonsuited; the other two, though not agreeing in their views, gave their opinion that the Plaintiffs were entitled to recover.

The *Zillah* Judge, Mr. *Rivaz*, on the 11th of *August*, 1842, decreed in favour of the Plaintiffs for the amount sued for, with costs.

The Defendant appealed to the *Sudder Dewanny* Court at *Allahabad*, urging, among other grounds of appeal, that the decree was invalid, having been adjudicated by the Judge on the day of the *Nag Punchemee* vacation. This objection was held fatal, and the *Zillah* Court's decree was reversed, and the cause remitted to be tried *de novo*.

About this time *Rai Ram Kishen*, one of the Plaintiffs, died, and the proceedings were afterwards carried on by *Rai Sri Kishen* only.

The suit, having been transmitted back to the *Zillah* Court, was again considered, and on the 14th of *September*, 1843, Mr. *Rivaz*, the Judge, pronounced the Court's decree in favour of the Plaintiffs.

The Respondent appealed to the *Sudder Dewanny Adawlut* for the North Western Provinces. At this stage of the proceedings the Respondent abandoned his plea to the want of jurisdiction, and desired that the case should be decided on the merits.

1853.

RAI SRI KISHEN v. RAI HURI KISHEN.

The appeal was then brought before the full Court, consisting of Messrs. *Benjamin Taylor*, *George Powney Thompson* and *James Davison*, Judges of the *Sudder* Court, in accordance with the provisions of the Act, No. II. of 1843, and a joint decree of those Judges was pronounced on the 7th of *April*, 1845, which reversed the decree of the *Zillah* Court. The principal grounds of the Court's decree were thus stated :—"The Court are of opinion, that the Plaintiff has failed to establish the nature of the dealings between the parties, that the evidence of the witnesses to *Rai Bunseedhur's* acknowledgment of the debt, at *Benares*, and to the '*khut*' (document), admitting that he was indebted to the Plaintiffs' father, in the sum of Rs. 20,400 15a. 6p., on an adjustment of accounts up to 1889, is totally unworthy of credit, from the contradictory and conflicting testimony of the witnesses. In regard to the other points recorded by the Judge, the Court are of opinion that the entries in a banker's books, unsupported by any proof of authority to expend the sums on account of the person from whom the money is claimed, or any acknowledgment by him of the balance, cannot be received as proof against him. This case was tried by Assessors in the Judges' Court, who declare that the custom prevailing amongst bankers and merchants, of keeping copies of letters, forwarding extracts from the accounts to the constituents at the various periods of adjustment, has not been observed. One of the Assessors, on the above and other grounds, considered that the Plaintiff had failed to establish his claim. The two others regard the claim to be proved. On an inspection of some of the items of the account, it is shown that large sums have been paid to *Rajah Putni Mull*, Plaintiffs' father, and to others of his near

relatives and dependants. There is no authority whatever from the Defendant or his father that the sums should be paid on their account, neither is there any acknowledgment on their part of the correctness or otherwise of the accounts said to have been transmitted by the Plaintiffs to them at various times between the years 1867 and 1894 *Sumbut*, although from the Plaintiffs' books it would appear that the accounts had been adjusted twenty-three times. The Court is, therefore, of opinion, that the Plaintiffs have totally failed to establish any claim against the Defendant, and reverse the decision of the Judge."

From this judgment the present appeal was brought.

The sole question argued was, whether there was sufficient evidence to substantiate the claim of the Appellant. It was insisted by the Appellant that entries in bankers' books, accurately kept according to the custom of *Mahajuns*, ought to have been treated by the *Sudder* Court as conclusive evidence, according to the custom of merchants in *India*, of the actual balance due, independently of the other evidence, consisting of the *rookah* and letters, and the parol proof of acknowledgment by *Rai Bunseedhur*; which the Appellant submitted fully proved that the debt claimed in the suit was due by the Respondent to the Firm.

Mr. *Roupell*, Q. C., Mr. *Forsyth*, and Mr. *Maule*, were heard in support of the appeal.

Mr. *Wigram*, Q. C., Mr. *Lloyd*, Q. C., and Mr. *Edmund F. Moore*, appeared for the Respondent, but were not called upon.

1853

RAT SRI KISHEN v. RAI HURI KISHEN.

Judgment was delivered by

The Lord Justice TURNER:

Their Lordships do not think it necessary to hear the Respondent in this case.

The nature of the case between the parties is this. The Plaintiffs are bankers, and they bring this action against the Defendant (the Respondent), who is the son of a deceased customer, for the purpose of recovering a balance which they represent to have been due to them at the time of the death of that customer, in the year 1838.

This question has been fully investigated by the *Sudder Dewanny Adawlut*, and the Judges of that Court have arrived unanimously at the conclusion, that the case made by the Appellant cannot be sustained. It is very difficult, of course, for us to think of reversing the unanimous judgment of the Judges of that Court, who had greater facility and better means of adjudicating upon questions of this nature than we can have upon the simple question of fact; and unless, therefore, we are satisfied by clear and convincing proof that the Judges of the Court below have, upon the evidence produced, arrived at a conclusion incapable of being maintained, according to the case which had been made before them, it can hardly be expected that this Court would reverse a judgment pronounced after due consideration of such evidence.

Now, the question which we have to consider here is, whether the Plaintiffs have or have not proved a balance of Rs. 42,416, which they claim, to have been actually due to them at the time of the death of *Rai Bunseedhur*. The evidence which has been adduced

upon their part may be classed under three heads. The first consists of what is called a *rookah*, or an acknowledgment of a balance, said to have been signed by *Rai Bunseedhur;* the second, the letters said to have been written by *Rai Bunseedhur;* and the third, of the parol evidence adduced before the Court for the purpose of proving admissions by *Rai Bunseedhur* of the amount of Rs. 42,416 having been due from him for the balance of his account with the Plaintiffs.

Now, with reference to the *rookah*, suppose we assume, for the present purpose, that it is perfectly genuine, the Plaintiffs' books can amount only to an admission of the balance due at the time when that *rookah* was signed; and it will amount, therefore, only to an admission, that on the 3rd of *July*, 1831, the date of the *rookah*, Rs. 20,450 were due from *Rai Bunseedhur* to the Plaintiffs; that of course is no evidence that the sum of Rs. 42,416 was due at the death of *Rai Bunseedhur*, seven years after the period when the *rookah* was signed; therefore, if the case rested on the *rookah* alone, there would be no evidence upon which it could be said that the conclusion of the Court below could be in any degree impeached.

Then, upon the second branch of the Appellant's case, some letters alleged to have been written by *Rai Bunseedhur* are put in, but we do not find, upon an examination of these letters, that they contain any distinct admission of any exact balance due from him at the period when those letters were written; and supposing even that they had contained any such admission, it appears that those letters do not go beyond the period of 1836, two years before the death of *Rai Bunseedhur*. The same principle that applies to the *rookah* applies equally to the admission contained

1853.

RAI SRI KISHEN v. RAI HURI KISHEN

in those letters, even if those letters had contained any admission of an ascertained balance due from *Rai Bunseedhur*. The documentary evidence wholly fails to prove the case which has been alleged on the part of the Appellant, and the Appellant, therefore, if he can maintain his case, must maintain it entirely upon the parol evidence.

Now, looking at the character and position of the witnesses who have been called to establish the acknowledgment, alleged to have been made by *Rai Bunseedhur*, in the year 1831, all of whom were servants of the Appellant; looking also at the fact that no account appears to have been delivered to *Rai Bunseedhur*, at the period when those admissions were made; it seems to their Lordships, that it is impossible, consistently with justice, to deal with those admissions as binding upon the Respondent, for the purpose of establishing a debt to this amount as due from the estate of *Rai Bunseedhur* at the period of his death. It has been very truly observed by Counsel in the argument of the case upon the part of the Appellant, that the Plaintiffs below have in truth proceeded upon the assumption that their books would be sufficient evidence for them to establish a debt against *Rai Bunseedhur's* estate; but, of course, it is unnecessary to say that they have been wholly mistaken in that assumption, and that these books could not, without further proof, be used in evidence as against *Rai Bunseedhur;* if, therefore, we assume these letters and these books to be in all respects genuine, those documents would not be sufficient to maintain the Appellant's case, and the parol evidence is, in their Lordships' judgment, wholly insufficient for that purpose.

1863.

RAI SRI KISHEN v. RAI HURI KISHEN.

But, in thus dealing with the case, their Lordships consider that they have given the Appellant a very great benefit; for, looking at the evidence and at the circumstances under which that evidence has been brought forward, it seems to their Lordships very difficult, to say the least of it, to consider that those documents are true and genuine documents. This action was founded upon the banking account; the Defendant, (the Respondent in the present case,) in his answer to that action, strictly challenged the Plaintiffs (now represented by the Appellant) with having nothing to maintain their case but their own books, and he disputed the admissibility of those books as conclusive evidence against him. The Plaintiffs, therefore, must then have been fully apprised that it was necessary to bring forward evidence confirmatory of those books, that occurred in the year 1838, but it was not until the year 1841 that these documents, the *rookah* and the other letters, were brought forward on the part of the Plaintiffs. Now, none of the witnesses that have been produced, have in any manner identified the documents; but independent of that, when we examine the parol evidence upon the subject of the *rookah*, it appears that two of the witnesses who were examined upon the subject differ as to the fact by whom that *rookah* was written, and there are other inconsistencies in the evidence. Then, again, in considering whether any weight can be possibly given to those documents, as evidence in the cause, the character of the witnesses must be taken into account; and with reference to several, indeed most of them, they were the Plaintiffs' servants; and one of whom, on whose evidence the Appellant's Counsel mainly

1853.

RAI SRI KISHEN v. RAI HURI KISHEN.

relied, *Atma Ram Ditchit*, appears to have been the servant of the father of the Plaintiffs.

Besides these circumstances, which attach suspicion upon the documents, the character and nature of the accounts are also to be considered. Now, the account which is furnished on the part of the Plaintiffs contains, among other items, a very large number of items for payments made by the Plaintiffs, as it is represented, for pensions to or allowed to different members of the family of *Rajah Putni Mull;* but it is most singular that though several of those payments were said to be made by the authority of *Rai Bunseedhur*, yet proof of the authority to make the payments wholly fails, except as it is proved by the accounts. Independently, however, of that, it appears that those payments have, ever since the death of *Rai Bunseedhur*, been continued to be allowed, and to be entered into the banking account against *Rai Bunseedhur's* estate.

Looking, therefore, at this case in every point of view, we are perfectly satisfied that this Court cannot, with any reasonable safety, disturb the judgment which has been arrived at by the Court below, and this appeal must, therefore, be dismissed, with costs (*a*).

(*a*) Upon the question of the admission of account, or banker's, books as sufficient evidence of itself of a debt, see *Sorab-jee Vacher Ganda* v. *Koonwur-jee Manik-jee* (1 Moore's Ind. App. Cases, 47); *Bunsee Dhun Nundee* v. *Mirza Mahomed Shuruff* (2 Ben. Sud. Dow Rep. 271) See also *Macpherson* "On Civil Procedure," p. 255.

ROBERT WATSON - - - - *Appellant*,

AND

SREEMUNT LAL KHAN - - - *Respondent*.*

On appeal from the Sudder Dewanny Adawlut at Calcutta.

3rd Feb., 1854.

The right to impeach a sale of lands for arrears of Government revenue extends not only to the defaulting proprietor, but to derivative holders under him.

THE Respondent in this appeal was the Plaintiff in the original suit, which he instituted against *John*

* Present: Members of the *Judicial Committee*,—The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, Knt., the Right Hon. Sir John Jervis, Knt., and the Lord Justice Turner.

By Ben. Reg. XI. of 1822, sec. 30, all underleases are extinguished by a Government sale of the proprietor's lands for arrears of revenue, and an auction purchaser takes the lands clear of all under-tenures.

At a sale by Government for arrears of revenue, the Government became purchasers, and afterwards granted a lease of the lands for a term of years, and put their lessees into possession. At the time of the sale the lands were subject to an *istimrary* lease. No suit was instituted to reverse the sale, but the Government, some time afterwards, in consequence of doubts as to the legality of the sale, offered to give up their rights under the sale, and to restore the lands to the original proprietors, subject to the recognition of the claims of their lessees. This offer resulted in an arrangement between the Government, the original proprietors, and the Government lessees, and eventually the original proprietors upheld the lease to the Government lessees to a part of the lands called the *Jungle Mehal*, for a term of years at a reduced rent. In a suit by the *istimrary* lessee for possession: Held (reversing the decree of the *Sudder* Court) that by Ben. Reg. XI. of 1822, sec. 30, the *istimrary* lease was determined by the sale for Government arrears, and, that the arrangement by which the lands were restored to the proprietors, subject to the rights of the Government lessees, was in the nature of a compromise, and not such an unconditional restoration as amounted to a reversal of the sale, and the consequent revival of the *istimrary* lease.

Aliter. If a suit had been brought, and a decree of the Court made for the reversal of the sale.

The Respondent, not having appeared, the appeal was, after two years,

1854.

WATSON v. SREEMUNT LAL KHAN.

Watson, deceased, *Robert Watson* (the present Appellant), and *Rajah Ajoodhya Ram Khan*, and others, as Defendants, to recover possession of certain lands called the *Hoodda Satpateo* and *Mouza Barwa*, in *Zillah Midnapore*, and for mesne profits and interest.

The Respondent rested his title to these lands on an *istimrary*, or perpetual lease at a fixed rent, granted in the year 1818, by *Rajah Mohun Lal Khan*, a former *Zemindar*, to the Respondent's father, in the *bename* (fictitious) name of *Kalee Pershad Roy*, his servant.

It appeared that the *Zemindary* was, in 1837, in the possession of *Rajah Ajoodhya Lal Khan* and his brothers, as joint proprietors, they having succeeded by inheritance, as co-heirs, on the death of their father *Rajah Mohun Lal Khan*. On the 1st of *September* in that year, in consequence of arrears of revenue due by them to the Government of *Bengal*, in respect of the land revenue payable on the *Zemindary*, the Government put up the *Zemindary* for sale by public auction, under the provisions of Ben. Reg. XI. of 1822. No purchaser having appeared, the Government, by their Collector, bid for and became purchasers thereof. The Government afterwards granted a lease of the lands to the Appellant and his brother, *John Watson*, for a term of twenty years, at an annual rent of Rs. 120,000. The lease contained several conditions, to one of which was annexed the following note:—"All *Ijaras* or farms granted by late proprietors, and all tenures created since the decennial set-

set down for hearing *ex parte*. Before the hearing, the Respondent appeared, and moved, under special circumstances, to postpone the hearing for six months, to enable him to lodge his case. The Judicial Committee put him upon terms of having the appeal heard at the next sittings; restraining him from doing anything in the interval to the prejudice of the fund in the Court below, and with payment of the costs of the application.

tlement, not coming within the exceptions specified in sec. 30 (*a*) of Ben. Reg. XI. of 1822, have been annulled by the sale of the estate, and may be set aside by the settling officer." Messrs. *Watsons* entered into possession, as lessees of the *Bengal* Government, the auction purchasers. The usual notice was given by the Collector for the farmers to produce their *pottahs* or leases. The Respondent having claimed as a lessee under the former *Zemindars* of the estates, the Appellant brought a suit in the Court of the Deputy Collector of *Midnapore* against the Respondent, and the Collector decided that the lease of the Respondent was defeated and put an end to by the Government sale for arrears of revenue, according to Reg. XI. of 1822, sec. 30, and his decision was affirmed upon appeal by the Commissioners of Revenue.

While these measures were being adopted by the Revenue authorities, the question of the legality of the sale came before the Government, by whom it was determined to be illegal, and, by a letter of the Government, dated the 24th of *July*, 1839, it was advised that the *Zemindary* should be restored to the *Zemindars*. In this letter there was an enclosure

(*a*) As the decision of this appeal in a great measure turned upon this section, the material part is here set out:—"All tenures which may have originated with the defaulter or his predecessors, being representatives or assignees of the original engager, as well as all agreements with *ryots*, or the like, settled or credited by the first engager or his representatives, subsequently to the settlement, as well as all tenures which the first engager may, under the conditions of his settlement, have been competent to set aside, alter, or renew, shall be liable to be avoided and annulled by the purchaser of the estate or *Mehal*, at a sale for arrears due on account of it, subject only to such conditions of renewal as attached to the tenure at the time of settlement."

1851.

WATSON v. SREEMUNT LAL KHAN.

referred to, as an exposition of the views of Government on the subject, being an extract from a letter from the Secretary to the Government of *India* to the Secretary to the Government of *Bengal*, under the date of the 18th of *July*, 1839. This enclosure stated as follows:—" His Honour in Council concludes that the estates must be restored to the owners in every respect free as it was before the sale, the under-tenants, of course, remaining as they were, *Watson's* lease being set aside, which the President in Council conceived could only be done by annulling the sale. For it would not be sufficient to restore the estate to the old proprietors, as all under-tenures fell with the sale, and there might be some difficulty, where there are so many proprietors, of whom many were minors, in completely saving these tenures otherwise than by the annulment of the sale. The President in Council, but for the lease of *Watson's*, would have had no hesitation in immediately annulling the sale, under cl. 4, sec. 3, Reg. XI. of 1822. With reference, however, to the peculiar circumstances of the case, it would be preferable, in the first instance, to come to an arrangement with *Watson*, on equitable terms, for the relinquishment of his lease, including a compensation for any title or loss which may have been actually secured by him; after such an arrangement the sale can be concluded by Government without difficulty. But if that gentleman should prove unreasonable, it will be necessary to suggest to the late proprietors to institute a suit in Court to set aside the sale, and to direct the Government pleader to consent to judgment against Government as purchaser. But it is desirable to avoid this expensive process, if complete justice to all parties can be done otherwise. In

BENGAL SECRETARIAT LIBRARY

1854.

WATSON
v.
SREEMUNT
LAL KHAN.

whatever amount the restitution may be accomplished, the President in Council conceives that it should be full, and done in a liberal manner, accounting with the proprietors for all mesne profits, after deducting the revenue." Difficulties, however, occurred: the Appellant and his brother, when applied to by the Government to ascertain whether they would consent to the restoration of the *Zemindary* to the *Zemindars*, without altogether declining negotiation, refused to consent to any terms which would have the effect of cancelling the sale of the *Zemindary*, or of altering their position as under-tenants of the auction purchase. A negotiation took place, from which nothing satisfactory resulted. By a letter from the Commissioner of Revenue to the Superintendent of Settlement at *Midnapore*, dated the 16th of *December*, 1839, after an expression of regret that the matter was not likely to be amicably arranged between the parties, it was stated as follows:—"If an amicable settlement is impracticable, then, on payment of the arrears of *jumma*, all right and interest which Government may have in the property must be restored to the *Zemindars*, upon condition of their abandoning all claims against under-tenures in consequence of the sale. Further, the *Zemindars* must be informed that the *Sudder* Board, with the sanction of the Government of *Bengal*, having given possession to *Watson*, as a tenant, on a lease for twenty years, it is for them to choose whether to institute a suit for the annulment of the same, on the ground of the sale being invalid, or to accept the property subject to *Watson's* lease." Some further correspondence took place between the parties, when the Government again offered, "that the *Zemindars* have the option of receiving the estate

1854.

WATSON v. SHEEMUNT LAL KHAN.

from Government, burthened with *Watson's* lease, he becoming their tenant, and they becoming his landlord, or of leaving the estate, as at present, in the hands of Government, and its lessee, *Watson*, and filing a suit to set aside the sale, and by consequence the lease, which suit would not be defended by Government. That if the *Zemindars* choose the former course, they must first pay up all arrears, and bind themselves, as representing auction purchasers, not to proceed against any under-tenants under Reg. XI. of 1812, but that this last condition was in no respects to interfere with the powers then possessed by *Watson* under his lease from Government, and finally, until *Watson's* lease was duly set aside by a decree of Court, the Government was answerable for the complete performance of every one of its conditions." These letters were communicated to the *Zemindars*. Ultimately the *Watsons* agreed to surrender the greater portion of the *Zemindary*, retaining only that portion of it called the *Jungle Mehal*, on the terms that, instead of paying the rent of Rs. 120,000 annually, they should pay a reduced sum to be settled and agreed between the *Zemindars* and themselves, for the reduced portions to be retained by them.

An agreement was ultimately executed by the Government, the *Zemindars*, and the *Watsons*, which recited, that the Government, as a favour, restored the *Zemindary* to them, upon condition that the farm as settled for with the *Watsons* was to be continued; that whatever rights the Government had acquired in consequence of the auction purchase of the *Zemindary* were to be conveyed to the *Zemindars*, and the *Zemindars* were to uphold the lease of the *Watsons* for the *Jungle Mehal* for twenty years, from the date of the

compromise, in the same manner as then held by them, taking the other parts into their possession. A reduced rent was agreed upon between the *Zemindars* and the *Watsons*.

On the 4th of *October*, 1844, the Respondent instituted the present suit in the Court of the Principal *Sudder Ameen* of the District of *Midnapore*, against the Appellant, and *John Watson*, since deceased, and *Rajah Ajoodhya Ram Khan*, *Zemindar* of *Midnapore*, to recover possession of *Hoodda Satpateo*, *Moulgah Bundava*, part of the *Jungle Mehal*, retained by the Appellant and his brother, under the lease from Government, together with the sum of Rs. 47,292, as mesne profits from the 22nd of *July*, 1840, the date when the *Watsons* were put in possession. The Plaintiff relied upon an *istimrary* lease, dated the 6th of *May*, 1818, to his father, in the name of one *Kalee Pershad Roy*, from *Mohun Lal Khan*, the father of the Defendant, *Rajah Ajoodhya Ram Khan;* and the plaint, after alleging that the *Zemindary* had been sold for arrears of revenue, and the lease to the *Watsons*, his ouster, and the compromise before mentioned, prayed that the Plaintiff might be put in possession of the property in dispute, with mesne profits from the time of dispossession.

The Appellant and his brother, by their joint answer, insisted, that the *istimrary* lease was a forgery, and that he should be nonsuited for not having made the Government a party to the suit; they moreover relied upon the fact of the Government having purchased the estate at public sale, in 1837, and the lease to them in 1838, transferring to them, as lessees, the Government's rights and privileges as auction purchasers, and authorising them to annul all contracts,

1854.

WATSON v. SREEMUNT LAL KHAN.

and set aside all incumbrances imposed upon the estate; and they further insisted, that although the Government subsequently restored the estate to the *Zemindars*, yet that the sale was not reversed, but, on the contrary, affirmed; that the Government, in restoring the *Zemindary* in pity to the *Zemindars*, gave up to them merely those rights which they possessed as auction purchasers, subject to the lease granted to the Appellant and his brother, which was to be upheld, and that they as a favour gave up to the *Zemindars* all but the *Jungle Mehal*, which they had continued in possession of as before, as lessees of Government.

The other Defendant, *Rajah Ajoodhya Ram Khan*, by his answer, supported the Plaintiffs' claim, insisting that *Watson* and his brother had no power to evict the Plaintiff from his *istimrary* property; that they had only a right to receive the fixed rents during the term of their lease, and that the Defendants, the *Watsons*, had no pleas to urge against the *istimrary* property of the Plaintiff. He also prayed, that, as he had no concern in the case, the Defendants, *Watsons*, being personally responsible, he might be exonerated from the claim of the Plaintiff.

The pleadings having been concluded, and evidence taken, the cause was heard by the Principal *Sudder Ameen*, on the 17th of *November*, 1846, who, by his judgment of that date, dismissed the suit. The substance of the judgment was, that when the *Zemindary* was sold for arrears of Government revenue, and bought by Government, the settlement of the former proprietors was set aside, and that when the Defendants, the *Watsons*, obtained possession of the *Zemindary*, the rights of the Plaintiff fell to the

ground; that under the compromise, by which the *Zemindary* was restored, the Defendants held a lease of the *Jungle Mehal* for twenty years, standing in the room of the auction purchaser, having a right in every way to set aside the settlement of the former proprietors; and ordered the suit to be dismissed: and, as it appeared to him that there was fraud on the part of the Defendant, *Rajah Ajoodhya Ram Khan*, he directed Messrs. *Watsons'* costs to be paid by him.

From this decree the Plaintiff appealed to the *Sudder Dewanny Adawlut* at *Calcutta*. The appeal came on for hearing on the 13th of *July*, 1848, before the full Court, consisting of Mr. *T. Tucker*, Sir *Robert Barlow*, Bart., and Mr. *J. Hawkins*, when that Court reversed the decree of the Principal *Sudder Ameen*. The material part of the judgment pronounced on that occasion, after holding that it was not necessary to make Government a party to the suit, as the Plaintiff had sued Messrs. *Watson* as lessees of the *Zemindary*, and not of the Government, proceeded as follows:—"We have no special rule, and no precedent to guide us; we must, therefore, decide upon the equity of the case. The ex-proprietors declare the sale to be altogether illegal; the purchaser admits that it is so; and both these parties, together with the lessees of the latter, all of them desirous of avoiding a suit in Court, meet to adjust the matter. Could these three parties, under such circumstances, legally come to an adjustment affecting the rights of a fourth, absent and innocent party? By a sale of an estate for arrears of revenue, all under-tenures created after the Decennial Settlement are *ipso facto* void; but these tenures are revived on the reversal of the sale by a Decree of Court. A Decree of Court would, in the present case, have protected all the

1854.

WATSON v. SREEMUNT LAL KHAN.

under-tenants; and the terms of *Watson's* lease, as far as they are concerned, would have been altogether a nullity. Instead of resorting to a Court of Justice, and in order to avoid this expensive process, the parties proceeded to an adjustment of the matter. The *Zemindars*, as already observed, declare the sale to be illegal; the purchaser directly admits that it is so, and the lessees by implication admits the same; for he is a party to the transaction which involves the relinquishment of the estate by the purchaser to the proprietors, and, at the same time, surrenders the lease obtained by them from the purchaser. To admit an auction purchaser, on the ground of illegality in the sale, to restore the estate to the proprietor without the intervention of a Court of Justice, and to restore to him all the rights and privileges of an auction purchaser, is to add another to the shifts and expedients already in practice among landowners for the extinction of titles created by themselves, upon the receipt of large considerations for the creation of them, and to jeopardise by an evasion of the law the rights of the holders of such titles. We do not mean to say that the possessor of a title is not to exercise his rights and privileges under that title, because there was originally a defect in it; nor do we mean to say that an existent defect in the conditions of a sale is to deprive the auction purchaser of his rights and privileges as such, so long as the sale is not contested. We are of opinion, however, that when the sale is admitted by the purchaser to have been illegal, and he relinquishes the estate to the ex-proprietors by an adjustment, which is had recourse to in order to avoid the expense of a lawsuit, such adjustment is a substitute for a Decree of Court, and must carry with it equal force for the protection of the under-tenants.

1854.
WATSON v. SREEMUNT LAL KHAN.

Such an adjustment is not a re-conveyance of the estate by a fresh sale, but an abandonment of the auction purchaser's title, and consequently an abandonment of his rights and privileges under it. For the foregoing reasons, we consider the Plaintiff is entitled to hold possession of his under-tenure against the Defendants, on payment of the stipulated rents; and that the Principal *Sudder Ameen's* decision must be reversed with costs."

Against this decree Messrs. *Watson* appealed to the Queen in Council. Subsequent to the admission of the appeal, *John Watson* died. The Appellant filed his petition of appeal in *December*, 1851, and lodged his printed case; but, as no appearance was put in by the Respondent, the Appellant, in *November*, 1853, set down the appeal for hearing *ex parte*.

28th Nov., 1853.*

Before the hearing, the Respondent put in an appearance, and applied, upon motion, that he might have six months' time to lodge his printed case, and that in the meantime the hearing of the appeal might be postponed. This application was supported by an affidavit of the Respondent's agent in *England*, who deposed that he had only received instructions to act for the Respondent on the 3rd of *November*, 1853, and had entered an appearance on the 7th of that month, and on the 19th had obtained the draft case from the junior counsel, but, from the voluminous nature of the proceedings, he believed that six months' time was necessary to have the case settled and printed; and he accounted for the delay by stating,

Present: The Right Hon. Dr. Lushington, the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, Knt, and the Lord Justice Turner.

1854.
WATSON
v.
SHEEKUNT
LAL KHAN.

that it arose from the ignorance of the Respondent of the rules and procedure of the Appellate Court, and not from any wilful or culpable neglect on his part. An affidavit also was filed by the Appellant's agent in opposition, which alleged, that the Respondent had made application to the Court in *India* to get out the money deposited, and that he had taken no steps in the appeal, and that he believed that he was anxious to delay the appeal, in order to obtain the money deposited in the Court below to abide the appeal.

Mr. *Palmer*, Q. C., in support of the motion.

Mr. *Leith* opposed.

The Right Hon. Dr. LUSHINGTON:

Great delay has taken place, and their Lordships cannot allow the Respondent any longer extension of time than *February* next, and that indulgence must be upon terms of the Respondent undertaking not to do anything in the interval to the prejudice of the Appellant, or to the fund, in the Court below, and paying the costs of this motion.

These conditions having been complied with, the appeal now came on for hearing.

Mr. *Wigram*, Q. C., and Mr. *Leith*, for the Appellant.

As auction purchasers, the Government, by Ben. Reg. XI. of 1822, sec. 30, became entitled to hold the *Zemindary* discharged of the Respondent's *istimrary* lease. All derivative tenures by that Regulation, which originate with a defaulter, or his predecessors,

are liable to be avoided and annulled by a purchaser of an estate at a sale for arrears of revenue. The Government, in this case, exercised their right, by granting a lease to the Appellant and *John Watson;* who thereby stood in the place of the auction purchasers. The question of the illegality of the sale, as assumed in the judgment of the *Sudder Dewanny* Court, was in truth not in issue in the suit. It was neither proved or admitted by the Appellant, or his brother, *John Watson.* There was, indeed, no ground to impugn the validity of such sale. The restoration of the *Zemindary* by the Government to the *Zemindars* was on the express condition that their lessees' title to the *Jungle Mehals* should be upheld. It was the result of an arrangement between the lessees, the Government, and the *Zemindars,* to keep in force the lease of Messrs. *Watson,* so far as respected the *Jungle Mehals,* and their right, by virtue of Reg. XI. of 1822, to hold the same discharged of any claim on the part of the Respondent as *istimrary* lessee. It was a matter of favour by the Government to restore, and the arrangement they insisted on, and to which the *Zemindars* agreed, must be viewed as a compromise. The proper party to question the sale was the *Zemindars,* not their lessee. The Respondent, however, is entitled to no indulgence; he stood by and delayed bringing forward his claim until the arrangement for restoration on those terms was concluded. He is, moreover, concluded by the proceedings which were had in the original suit respecting his title before the Collector.

Mr. *Forsyth,* for the Respondent.

The principle enunciated in the judgment of the Court below, that the re-adjustment was not a re-con-

1854.
WATSON v. SREEMUNT LAL KHAN.

veyance of the estate, but an abandonment of the auction purchasers' title and of Messrs. *Watsons'* rights and privileges, was quite correct, and such as a Court of Equity would uphold. The sale of the *Zemindary* for arrears of Government revenue was illegal, and that fact was not disputed by the Government. The arrangement entered into between the *Watsons* and the ex-proprietors, with the sanction and the recommendation of Government, in order to avoid the expenses of a law-suit, was equivalent to a Decree of the Court reversing the sale, and carried with it equal force for protection of the rights of the under-tenant; and, consequently, the *Watsons* had no right to withhold possession of the estate from the Respondent, the *istimrary* lessee. The legal effect of the invalidation of the sale being to put all parties in *statu quo*, and, therefore, the Respondent's lease remained in force, and the lease granted by Government to Messrs. *Watson* became void.

Mr. *Wigram*, in reply.

The Lord Justice TURNER:

This case comes before their Lordships upon an appeal from the *Sudder Dewanny Adawlut*, that Court by its decree having established a perpetual lease in favour of the Respondent in the lands which are in question in the cause.

These lands appear to have been originally the property of *Rajah Mohun Lal Khan*, who, in the year 1818, granted a perpetual lease of them in favour of the Respondent's father, under whom he claims.

It appears that in the year 1837 the Government revenue had fallen into arrear, and, in consequence of that arrear, a sale of the lands took place, for the pur-

pose of satisfying the Government revenue, and upon that sale the Government became the purchasers of these lands, and the sale to the Government was fully confirmed according to the Regulations in that behalf provided.

The sale having been confirmed, the Government granted a lease of the lands for a term of twenty years to the present Appellant and his brother, to whose rights the present Appellant has succeeded; and the effect of these transactions was, that there having been a confirmation of the sale made for the purpose of satisfying the Government revenue, the Government acquired a title to those lands under the Regulations, subject only to be impeached, according to the provisions which are made in the Regulations, by a suit by parties having a right to impeach the same.

Some question has been raised in the course of the argument, upon the point whether the right to impeach the sale belonged simply to the original proprietors of the land, or whether it also extended to parties claiming under those proprietors, or having estates under those proprietors antecedently to the sale having been made. But their Lordships have no doubt upon that question, that the right to impeach the sale given by the Regulations was not merely to the original proprietors, but to parties having estates derived from those proprietors antecedently to the sale being made.

The title of the Government, therefore, under the sale, being valid, subject only to its being impeached by a suit, the title of the lessees under the Government became equally valid, subject only to the same liability to be impeached by parties having an interest in the lands antecedent to the sale which was made.

1854.
WATSON v. SARBMUNT LAL KHAN.

It appears, that some time after the sale had taken place, the Government became sensible that the sale was not a valid sale. It does not appear, however, that there was any admission that the sale was invalid, which would have bound the Government in any proceeding taken against them, and much less does it appear that any admission of the invalidity of the sale was made by the *Watsons*, who claimed under the lease granted to them by the Government.

The result, however, of the proceeding appears to have been, that the Government, being sensible that the sale was not a valid sale, were desirous of coming to an arrangement with the original proprietors of the estate, and for the restoration of the estate; but the position of the *Watsons*, the lessees under the Government, created an impediment to the estate being absolutely restored. The effect, however, was, that a negotiation took place between the Government, the original proprietors, and the *Watsons*, the lessees, under which terms were to be settled for the purpose of restoring the estate to the original proprietors, due regard being had to the claims of the *Watsons*, the lessees. Now Messrs. *Watson*, it appears, were not desirous of retaining their right under the lease to the whole of the property which had been leased to them by the Government, but they were desirous of retaining their right to a portion of the property which was called the "*Jungle Mehals;*" accordingly, the arrangement resulted in this, that the *Watsons'* right under the lease in the *Jungle Mehals* was to be maintained, but that their right in the other property comprised in the lease was to be restored or given up to the original proprietors, and all the rights of the Government were also to be given up to them.

That arrangement was accordingly made, and the

Watsons took a new lease of the *Jungle Mehals* from the original proprietors in consequence, at a reduced rent. The Respondent, whose right was founded on an antecedent perpetual lease granted by a former *Zemindar*, does not appear to have been any party to this arrangement, and, having been no party to this arrangement, he institutes the present suit for the purpose of displacing the lease held by the *Watsons* under the arrangement made with the Government and the original proprietors, and for possession under his *istimrary* lease, with mesne profits. At the hearing of the suit, the *Sudder Ameen* was of opinion that the Plaintiff's title had been displaced by the original sale to the Government, and dismissed the suit. That decision became the subject of an appeal to the *Sudder Dewanny Adawlut*, and that Court reversed the Decree of the *Sudder Ameen*, establishing the perpetual lease in favour of the Respondent, setting aside the lease to the *Watsons*, and decreeing the Respondent possession, with mesne profits from the time when the *Watsons* became entitled under their lease.

The question before us is, whether that Decree ought to be maintained or not.

Now, the first consideration is, how does this matter stand? There can be no doubt that, *primâ facie*, according to Regulation XI. of 1822, the Appellant is entitled, because the effect of that Regulation is, that on the Government revenue falling into arrear, and a sale made by the Government for the purpose of satisfying that arrear, not only is the estate of the original proprietors, which has been sold, displaced, but all under-tenures founded on that estate is also liable to be avoided and annulled.

Some argument might turn upon the question of

1854.
WATSON v. SREEMUNT LAL KHAN.

their being properly avoided and annulled; but beyond all question, if proper steps were taken for the purpose of avoiding and annulling the under-tenures, those under-tenures could not stand as against a *bonâ fide* sale made by the Government for the purpose of satisfying the arrears.

Primâ facie, therefore, the case made on the part of the Appellant appears to be perfectly right and correct; and it rests, therefore, on the Respondent to displace the position of the Appellant, and to show that the lease which has been granted to Messrs. *Watson* cannot be maintained against his (the Respondent's) perpetual lease.

Now, the Respondent might no doubt have sued for the purpose of setting aside the sale, and consequently the lease which was granted to the *Watsons;* but no proceedings have been instituted by him for that purpose. The grounds on which it is said that the title of the Appellant cannot be maintained, and which have been argued upon, are these:—first, that the Appellant, by the effect of the arrangement made with him and his brother and the Government, has placed himself in the position of a mere under-lessee of the original proprietors, and, therefore, subject to the right of the perpetual lessee derived under the perpetual lease antecedent to the lease of the Appellant; and, secondly, it is said that the Appellant has been so mixed up in the compromise which was entered into between the Government and the proprietors, that it is not now competent to him to impeach the title of the Respondent under the perpetual lease; thirdly, it is said, that according to the terms of the Regulations, the Appellant had no right to avoid the perpetual lease, or that, if he had a right to avoid, he has not, in fact, avoided it.

Now, with regard to the first question, that the Appellant has placed himself in the position of an under-lessee, their Lordships think upon the whole of the arrangement between these parties, it is perfectly clear, that it was the intention of all parties by that arrangement, that the right of the *Watsons* in respect of the lease granted to them by the Government should be maintained. It was a compromise between the *Watsons*, the Government, and the original proprietors; and part of the terms expressly stipulated by the *Watsons* throughout were, that their original title under their lease should be maintained as to the *Jungle Mehals*, and their Lordships do not think that the counterpart of the lease executed by the *Watsons* to the original proprietors had the effect, or was an arrangement which placed the *Watsons* in a position directly contrary to that in which it was expressly stipulated they should be placed, and for which that very instrument itself was prepared.

On the next ground, whether the Appellant has been so far a party to these proceedings as to be estopped from disputing the title of the Respondent, the same arguments that apply to the first point also apply to this. It is, in truth, a question of compromise and arrangement between these parties. No right which the Respondent may have had by this proceeding to impeach the title of the Appellant derived under the sale was in any degree affected by that arrangement, and their Lordships, therefore, do not think there is anything in that arrangement which could affect the title of the Appellant, and render it incumbent on him to submit to the lease which had been granted to the Respondent.

Upon the last point, which is a simple question whether the Appellant had a right to avoid the lease

1854.
WATSON v. SHEEMUNT LAL KHAN.

if sufficient measures were taken to avoid it, it seems that the terms of Regulation XI. of 1822, sec. 30, are, that it shall be liable to be avoided or annulled by the purchaser of the estate. The *Watsons* must be considered as the purchasers within the meaning of that Regulation, and it is perfectly clear, upon the whole of the proceedings in the suit, that the proper means have been taken for the purpose of avoiding it, in the proceedings which were taken by them before the Collector, to which the Respondent was a party, for the purpose of setting aside the lease.

The Court below, in giving judgment on these points, appear to have proceeded mainly upon two grounds: first, that the rights of an absent party, who was no party to the compromise, must of course be regarded. The Court below does not seem to have considered that, in truth, all the right of that party was merely to institute a suit for the purpose of setting aside the sale which had been made to the Government, and the lease which had been granted under that sale. The Court below seems also to have proceeded upon some notion of an abandonment by the *Watsons* of their title under their lease, but it is perfectly clear upon the evidence in this case, that if there was any abandonment at all, it was an abandonment upon terms, and that the Respondent, if he adopted the abandonment, must also adopt the terms on which that abandonment was made.

Their Lordships, therefore, think that the decree of the *Sudder Dewanny* Court cannot be maintained; and the effect will be, to reverse the decree of that Court, of the 13th of *July*, 1848, and restore the original decision of the Principal *Sudder Ameen* of the 17th of *November*, 1846.

The Defendant, *Rajah Ajoodhya Ram Khan*, was

ordered by the *Sudder Ameen* to pay the costs. Their Lordships do not disturb that part of the decree. The Respondent will have to pay the costs of the appeal from the Principal *Sudder Ameen* to the *Sudder Dewanny* Court, but no costs of appeal in this Court.

1854.
WATSON v. SHEEKUNT LAL KHAN.

THE GOVERNMENT OF BENGAL - *Appellants*,

AND

NAWAB JAFUR HOSSEIN KHAN - *Respondent*.*

On appeal from the Sudder Dewanny Adawlut at Calcutta.

3rd, 4th, 6th 7th, 13th, & 18th Feb., 1854.

Resumption by Government of *Numuk sayer mehals* (Saltpetre duty estates) upheld: The *sunnuds* of the *Soobadar* of *Bahar*, the ruling power previous to the Company's accession to the *Dewanny*, purporting to grant this Government revenue as *mocurrery istimrary*, at a permanent fixed rent, being declared forgeries.

Quære.—Whether the *Numuk sayer mehals*, being a *sayer* right, was not wholly abolished by Ben. Reg. XXVII. of 1793, and the *Bengal* Government, in their Sovereign character, had not an absolute right to resume.

The settlement by the Government with a proprietor of the soil, under the Decennial Settlement, made perpetual by Ben. Reg. VIII. of 1793, relates to land revenue only, and not to *sayer* duties claimed by a party not a land proprietor.

Semble.—The word "*mocurrery*," in a *sunud*, does not necessarily import "perpetuity."

THIS appeal arose out of a claim, on the part of *Burkut-oon-Nissa Begum*, grandmother of the Respondent, to be put in possession, at a fixed *jumma*, of certain *Numuk sayer mehals* (Saltpetre duty estates) in *Pergunnahs*, *Suresa* and *Kusma*, in the District

* Present: Members of the *Judicial Committee*,—The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, Knt., the Right Hon. Sir John Jervis, Knt., and the Lord Justice Turner.

1854.

THE BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN.

of *Tirhoot, Bengal*, which were resumed by the *Bengal* Government in the year 1817.

The nature and tenure of the *Numuk sayer mehals*, and the mode in which the Native Governments originally collected or granted this revenue, and the facts and evidence in the suit, are elaborately detailed in the judgment. The following is a short statement of the facts of the case:—

The Respondent, *Nawab Jafur Hossein Khan*, alleged, that in the year 1736, his great grandfather, *Khwajah Ubd-ool-Ghunee*, became entitled to the *mehals* in question, under a *sunud* or grant from the then *Nazim* of *Behar* to himself and his posterity, at a fixed *jumma* of Rs. 2,101. 1a., and that under that grant his great grandfather, *Khwajah Mahomed Sumee*, his great grandmother, *Mussumat Bebee Sifut*, and his grandmother, *Burkut-oon-Nissa Begum*, successively held the property at that *jumma* down to its resumption by Government.

It appeared that *Khwajah Mahomed Sumee* died some time between the years 1794 and 1799; that *Bebee Sifut* died about 1805–6, and that *Burkut-oon-Nissa Begum* died about 1816–17. Upon her death, the Board of Commissioners caused an inquiry to be instituted, which led to the resumption of the property by Government. On the occasion of this inquiry, *Noor-ool-Husun Khan*, the son of *Burkut-oon-Nissa Begum*, represented himself as entitled to the property at the fixed *jumma* of Rs. 2,101. 1a.; but he produced no *sunud* in support of his title. The documents, however, eventually produced by him, and the records in the possession of Government, disclosed the following facts:—With respect to *Suresa*, they showed that the *jumma*, instead of having been

fixed, was constantly varying from the year 1733 down to 1780; that at that time the *jumma* of three-fourths of the *mehal* in *Suresa* was Rs. 1,351; that in 1783 to 1794, the *jumma*, in respect of these three-fourths, was entered in the name of *Khwajah Mahomed Sumee;* that in 1799 and 1803, the like *jumma*, in respect of these three-fourths, was entered in the name of *Bebee Sifut;* that the other one-fourth, in the year 1765, belonged to *Baboo Doorgbijy Sing*, and afterwards to *Baboo Surupjeet Sing*, and was in the year 1803 resumed by Government; and that in the year 1803–4, the whole of the *mehal* in *Suresa* was entered in the name of *Bebee Sifut*, at Rs. 1,809, at which amount the *jumma* subsequently continued. And, with respect to *Kusma*, the documents showed that the *jumma* constantly varied from the year 1760; that the property formerly belonged to *Maharajah Lal Bullam*, and was resumed by Government about 1799, and that in that year the *jumma* first became Rs. 292. 1p., and in 1803 was paid at that rate in the name of *Bebee Sifut*. It also appeared, that, on the death of *Bebee Sifut*, the name of *Burkut-oon-Nissa* was, on the 2nd of *July*, 1806, entered on the records at the *jumma* of Rs. 1,809. 12a. as to *Suresa*, and Rs. 292. 1a. as to *Kusma*. The result, therefore, was, that it was only from the year 1803 that the *mehals* in *Suresa* and *Kusma* appeared to have been held together at the *jumma* alleged. It also appeared by the Government records, that although in 1786–7 and 1793–4 the *sunuds* of the *Mocurrerydars* of the District had been called for by the authorities, and copies of the *sunuds* had been kept in the Government Office, no copy of any *sunuds* relating to the *mehals* in question was to be found there. These

1854.

THE BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN.

circumstances appeared to negative the supposition of an ancient grant of the *mehals* in *Suresa* and *Kusma* at a fixed *jumma*, to the ancestor of *Noor-ool-Husun Khan*. It was also a known circumstance, that on the occasion of the Decennial Settlement (which was afterwards made perpetual) the saltpetre *mehals* in *Tirhoot* had not been included. And, as the probability appeared to be, either that there was no right to the *mehals* in *Noor-ool-Husun Khan*, or, that if there was any such right, that there was at all events no right to hold the *mehals* at the fixed *jumma* alleged, but that Government were entitled to assess them in the ordinary manner, the Government resumed the *mehals*.

On the 3rd of *September*, 1818, a plaint was filed in the name of *Burkut-oon-Nissa Begum* against the Government, in the *Patna* Provincial Court, for possession of the *Numuk sayer mehals*, which she claimed to be entitled to under a grant from former *Nazims* to *Khwajah Ubd-ool-Ghunee*, at the fixed assessment of Rs. 2,101. 1a.

Before the answer was put in, the claimant produced a *sunud* from *Zyn-ood-deen Ahmud Khan* to *Khwajah Ubd-ool-Ghunee*, of *Pergunnah*, *Suresa*. This *sunud* was to *Khwajah Ubd-ool-Ghunee* to be held as "*ba fursundan*," and Government took the opinion of the Mahomedan law-officers as to meaning of that term; and their answer was to the effect, that the claim was invalid, as no one could claim the *mocurrery* after the death of *Khwajah Ubd-ool-Ghunee*. The Collector of *Tirhoot*, on behalf of the Government, by his answer, insisted, first, that no reliance could be put upon the *sunud* adduced by the Plaintiff, which, up to the time of the present suit, was not entered in any of the

offices of Government; secondly, that if the *sunud* in question was admitted on the ground of its being authentic, even then, the grant was liable to resumption, by reason of the death of the original grantee, under the provisions of Reg. VIII. of 1793, sec. 16; and thirdly, that if the *sunud* in question was taken as a grant including descendants, it was not worthy of being upheld, according to the *fatwa* of the law officers. The reply combated the construction which the answer put upon the meaning of the *sunud*, and on the Regulations which were there cited. And, with reference to the non-production of the document before the resumption of the property by Government, the Plaintiff explained this circumstance by saying, that he had never been required to produce the *sunud* by the Board of Commissioners. The Collector, in his rejoinder, reiterated the reasons why he denied the validity of the claim, first, that the Plaintiff's *sunud* was not authentic: secondly, if authentic, the *mocurrery* in question, owing to the death of the original grantee, according to the sections 16 and 17 of Reg. VIII. of 1793, reverted to the State; and, thirdly, that by the term '*ba furzundan*' being inserted in the *sunud* adduced by the Plaintiff, no title was made out for the Plaintiff, who was of the children's children of the original grantee.

The cause was then at issue, but it was not till *December*, 1823, that the claimant put in evidence, for the first time, another *sunud*, dated 25th *Jumadee-oos-sanee*, 18th *Juloos* (A.D. 1736). This document purported to grant *Pergunnahs*, *Suresa* and *Kusma* at a fixed *jumma* of Rs. 2,603. 1p. to *Khwajah Ubd-ool-Ghunee* as a *mocurrery istimrary* to continue to him and to his children, generation after generation.

Before the case was decided, a Special Commis-

1854.

THE BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN

sioner was appointed for the *Patna* Division under Regulation III. of 1828; the suit, together with all the proceedings and evidence, was transferred to that Court; and, on the 5th of *May*, 1829, an order was made to compel the complainant to bring the cause to a hearing.

On the 30th of *May*, 1829, the Special Commissioner pronounced his decree in the cause, dismissing the claim. This decree proceeded to declare that although the claimant might be a descendant from the family of *Khwajah Ubd-ool-Ghunee*, she was not his direct offspring; consequently her objection was untenable. That from the report of the Record-keeper of the Collectorate, it appeared, that from the beginning of 1141 *Fusly*, the *mocurrery* salt *mehal* of the *Pergunnahs* in question had not been at a fixed unfluctuating assessment; the *mehal* sometimes appeared under the item of "miscellaneous," with fluctuating assessments, and sometimes at its present *jumma*, and no copy of the *sunud* was ever filed in the Collectorate, although several times called upon to do so, and although, on the authority of this *sunud*, the claimant's possession was, somehow or other, allowed to continue, yet it was clear that the Collectors had never looked into this matter. In the judgment of the Court, the claimant appeared to have no claim to the salt *mehals*, either by the Mahomedan law or the Regulations of Government. It was, therefore, ordered, that claim be dismissed, with all the costs of the case against her.

After this decision had been made, it was considered that, as the case had been pending previously to the Reg. III. of 1828, it was not within the jurisdiction of the Special Commissioner, and in 1830 it was ordered that the cause should be returned to the

Patna Provincial Court. This was accordingly done, and the *Patna* Provincial Court assumed cognizance of the cause in the month of *April*, 1831. In the year 1833, the *Patna* Provincial Court was abolished, and the suit was transferred to the *Zillah* Court of the District of *Tirhoot*, and the case was again considered in that Court. On the 27th of *March*, 1837, the Court of *Tirhoot* gave judgment in the suit, and after observing that the *sunuds* were open to considerable suspicion, proceeded in these terms :—" Independent of which, the second *sunud* which the Plaintiff has produced has only the words '*Ba furzundan*' (with descendants) recorded in it, and has not the words '*nuslun bàd nuslin*' and '*butnun bàd butnin*' (generation after generation), and by the word '*furzundan*' agreeably to the *futwas* (law opinions) of the law doctors, copies of which are on this file, only direct descent, *furzundan-i-sulubi*, is meant. Hence, after the death of direct descent of *Ubd-ool-Ghunee* and the extinction of such descent, this *mocurrery* became resumable; but by the neglect of the Collector of that time it was not resumed; and when the existing authority took the case into consideration it was resumed. Under this circumstance, for the reasons above stated, this *Mocurrerydar* has no title for its being relinquished; consequently, it is ordered, that the claim of the Plaintiff be dismissed, with costs."

From this decree the claimant appealed to the *Sudder Dewanny Adawlut* at *Calcutta*, and filed a petition containing the grounds of her appeal.

The case came on before Mr. *Abercrombie Dick*, one of the Judges of the *Sudder* Court, on the 29th of *September*, 1841, who recorded his opinion as follows:—" In my judgment, for various reasons, the

1854.

THE BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN.

claim of the Plaintiff (Appellant) appears a just one, and she is entitled to the restitution of the salt *mehal* in question and the recovery of the mesne profits of the same. 1st. The *sunud* of *Nawab Alı̈ Wurdee Khan*, adduced by the Plaintiff, appears perfectly free from all doubts and suspicion; because, at the time the *sunud* in question was granted, *Alı̈ Wurdee Khan* was the *Soobahdar* of *Soobah Behar*. 2ndly. It is quite clear that Appellant and her ancestors have by the means of this *sunud*, and the second *sunud* granted by *Ahmud Khan, Bahadur*, regularly discharged the *mocurrery* Government revenue since 1797. 3rdly. In 1804, a settlement of the salt *mehal* in dispute was effected by *Kistbundy* (instalments), between the Government and *Mocurrerydar*, and, agreeably to which *Kistbundy*, the *mocurrery* revenue was discharged until the resumption. Hence, agreeably to the Regulation which recognises the validity of the *sunud* granted for land by *Soobahdars*, it is just and proper that the *sunud*, on which there is no ground for suspicion, should be considered valid." And the Court ordered, that the judgment of the *Zillah* Court of *Firhoot* should be reversed, and the then Appellant put in possession of the *mehals* in question, and receive the mesne profits for the year 1225 Fusly (1817, A.D.).

The Appellants petitioned for a review of judgment, which the Court rejected. The Appellants then appealed from this Decree of the *Sudder* Court, and the Order refusing a review of judgment to *England*. After the admission of the appeal, the present Respondent, on the representation that *Burkut-oon-Nissa Begum* was dead, and that he was her grandson and heir, was admitted as Respondent in the appeal.

Mr. *Wigram*, Q. C., and Mr. *Lloyd*, Q. C. (with them Mr. *Forsyth* and Mr. *Maule*), for the *Bengal* Government in support of the appeal.

The argument turned chiefly upon the validity of the *sunuds*, and the suspicious circumstances under which they were produced. The principal points urged by the Appellants, were—

First. That the right claimed in the suit was a *sayer* right, consisting of a claim to duties on saltpetre, and, that such right was absolutely abolished by *Ben.* Regs. VIII. of 1793, and XXVII. of 1793, so that, even if the *sunuds* were genuine, a grantee could have no title against the Government's right of resumption.

Second. That the term "*ba furzundan*," in the *sunud* relied upon by the Respondent, conferred no title on him, as those words created a limitation in tail male, which terminated with the lineal heir of the original grantee; it being an estate tail male created by the Sovereign power run out. 1 *Macnaghten's* Prins. of Mah. Law, p. 331, *The Government* v. *Maharajah Konwur Baboo Kerut Singh* (*a*), *Mussummata Hya-on-nisa* v. *Mofukhir-ol-islam* (*b*), Prof. *Wilson's* Glossary, *voce* "*Furzund.*"

Third. That it was a fiscal matter, which the Mahomedan Governments granted and resumed at pleasure, and that as the *Bengal* Government succeeded to these Sovereign powers, the right of resumption followed as a matter of power vested in them on their assumption of the Government. *The East India Company* v. *Syud Ally*, referred to in vol. 2 *Gleig's* Life of *Sir T. Monro*, pp. 376, 390.

(*a*) 6 Ben. Sud. Dew. Rep. 100.
(*b*) 1 Ben. Sud. Dow. Rep. 107, note.

1854.

THE BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN.

Fourth. That the Court below improperly received as evidence the *sunuds* without the proof required by *Ben.* Regs. II. of 1819, sec. 28, and XIV. of 1825, sec. 3 (*a*).

Mr. *R. Palmer*, Q.C., and Mr. *Leith*, for the Respondent,

Contended, that the *Numuk sayer mehals* were not liable to resumption by any of the Regulations relied upon by the Appellants, as those Regulations had no application to *sayer* duties. *Baillie* "On the Land Tax of *India*," p. xxiv. That, even if they had such a right to resume, it was barred by lapse of time, *Maha Raja Dheeraj Raja Mahatab Chund Bahadoor* v. *The Bengal Government* (*b*), *Baboo Byjnath Sahoo* v. *Government* (*c*), *The East India Company* v. *Oditchurn Paul* (*d*), as the evidence proved that *Burkut-oon-Nissa Begum*, and her ancestors, had not only a valid title as *Istimrary Mocurrerydar* of the *Numuk sayer mehals* under valid grants from the Mahomedan Government, *The Government* v. *Maharajah Konwur Baboo Kerut Singh* (*e*), *Deodutt Rai* v. *Oodwunt Rai* (*f*), *Runglal Chowdhry* v. *Ramnauth Dass* (*g*), but also a good possessory title of eighty years, and that the Government had recognised the validity of the *sunuds*.

(*a*) See also upon this point, 2 Archbold, p. 1323-32; *Gibbs* v. *Pike* (9 Mee. & Wels. 351); *Goslin* v. *Corry* (8 Scott N. R. 25); *Sorden* v. *Cowton* (3 Jur. 1027); *Martin* v. *Podger* (5 Burr. 2631). And, as the weight to be given to fresh evidence, *Crease* v. *Barrett* (1 Crom. Mee. & Ros. 919); *Weak d. Burge* v. *Callaway* (7 Price, 577); *Thurtell* v. *Beaumont* (1 Bing. 339).

(*b*) 4 Moore's Ind. App. Cases, 466. (*c*) 4 Ben. Sud. Dew. Rep. 275.
(*d*) *Ante*, p. 43. (*e*) 6 Ben. Sud. Dew. Rep. 100.
(*f*) 4 Ben. Sud. Dew. Rep. 226. (*g*) 2 Ben. Sud. Dew. Rep. 114.6.

Judgment was reserved, and now delivered by

1854.

THE BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN.

The Lord Justice TURNER:

5th July, 1854.

The question in this case, is, whether the late Respondent, *Burkut-oon-Nissa Begum*, the grandmother of the now Respondent, *Nawab Jafur Hossein Khan*, was in her lifetime entitled to hold the *Numuk sayer mehal* of two *Pergunnahs* called *Suresa* and *Kusma*, within the District of *Tirhoot*, in the Province of *Behar*, in the Presidency of *Bengal*, at a fixed *jumma* of Rs. 2,063. 0a. 1p. The *Numuk sayer mehal* is the revenue which, before the accession of the East India Company to the *Dewanny*, was derived by the Native Governments from the manufacture of saltpetre, and upon the Company's accession to the *Dewanny* they became entitled to this revenue, subject, of course, to any valid and effectual disposition of it which might have been made by the Native Governments, in so far as the Company might be bound by such dispositions. The mode in which this revenue was collected before the Company's accession to the *Dewanny* appears to have been, that the *Zemindars*, on whose lands the saltpetre was produced, collected it from the *Nooneeahs* or manufacturers in kind, receiving from them about one-half of the produce, of which the *Zemindars* retained one-fourth, and delivered the remaining three-fourths to the officers of the Government; and the same mode of collection and division seems to have prevailed after the Company's accession to the *Dewanny*, except that the collection from the *Nooneeahs*, and the subsequent distribution of it, was made in money according to the actual current value of the saltpetre.

These facts appear from the report of the *Numuk*

1854.

THE BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN

sayer mehals, which is to be found in the papers, where it is stated that previously to the Company's accession to the *Dewanny*, the *Zemindars* of *Tirhoot* collected the saltpetre from the *Nooneeahs* or manufacturers in kind, receiving, it would appear, about one-half of the produce, of this they retained one-fourth, delivering the remaining three-fourths to the public officers. Subsequently to the accession, the same system appears to have prevailed, excepting that the *Malika*, or proprietors, collected from the manufacturers, in money, according to the actual current value of the saltpetre, and they in their turn paid the proportion of public revenue into the treasury.

Both before and after the Company's accession to the *Dewanny*, the Government revenue consisted of three-fourths of the one-half which was received from the *Nooneeahs*, the remaining one-fourth of what was so received being retained by the *Zemindars*.

Such being the general outline of the rights of the Native Governments, and of the Government of *India*, and of the *Zemindars*, in the saltpetre collected by the *Nooneeahs*, it will be convenient in the first place to consider how this case stands upon the evidence, without reference to the *sunuds*, the authenticity of which was so much discussed in the argument, and to some matters more immediately connected with those documents.

It appears that the fixed *jumma* of Rs 2,063. 0a. 1p. at which the *Numuk sayer mehal* of the two *Pergunnahs*, *Suresa* and *Kusma*, is claimed to be held, is composed of two parts, namely, Rs. 1,809 for *Pergunnah*, *Suresa*, and Rs. 251. 0a. 1p. for *Pergunnah*, *Kusma*. It further appears, as to *Pergunnah*, *Suresa*, from the *Wasil baky* papers, (that is, papers signed by Government officers,

1854.

THE BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN.

stating the sums collected and balances outstanding), the *Kistbundy* of 1803–4, and the Report of 1806, that from 1785–6 to 1803–4, three-fourths of the salt *mehal* of this *Pergunnah* (and it is observable that in the Report of 1806 these three-fourths are called the salt *mehals*) were held at a *jumma* of Rs. 1,351, and were recorded at that *jumma*, both in the Decennial Settlement book of 1789–90, and in the Quinquennial Settlement of 1794–5, in the name of *Khwajah Mahomed Sumee*, and in the book, 1799–1800, were recorded in the name of *Bebee Sifut*, wife and heir of the *Khwajah*. This appears by the *Wasil baky* accounts, the *Kistbundy*, and the Report of 1805–6. And this holding at Rs. 1,351 is carried back to the year 1780–1 by the Report of the 11th of *August*, 1824, put in by the Appellants; and the same documents show, that in 1803–4, Rs. 458. 12a. were added to the *jumma* for the one-fourth resumed *mocurrery* of *Baboo Surupjeet Sing*, and that the salt *mehals* of *Suresa* were thenceforth held at Rs. 1,809. 12a. up to 1817, and were recorded in the name of *Bebee Sifut* until the year 1806, and afterwards in the name of *Burkut-oon-Nissa*, her daughter and heir.

This is in fact the account which appears in the papers in the suit. It is an account, first, of the year 1785–6, in which three-fourths of the *mehal jumma* is stated to be Rs. 1,351, and there is "Received as follows, 1,351 rupees," that is, for the year 1785–6. That continues again in the year 1786–7, which is described as "$\frac{3}{4}$ *mehal jumma*, 1,351, annually," and it is also described in the same manner in the *Wasil baky* account for 1787–8. Then in the year 1803–4 the "*Kistbundy* of salt *mehal* of *Pergunnah, Suresa*" is described as "Three shares of *Nizamut*, 1,351 rupees" (I have an observation to make upon that

1854.

THE BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN.

word "*Nizamut*" presently), "and fourth share 458;" and the Report of 1806 states, that "the salt *mehals* of *Pergunnah, Suresa* are recorded in the Decennial Settlement book of 1119 *Fusly* (A.D. 1789–90), and in the Quinquennial Settlement book of 1202 *Fusly* (A.D. 1794–5), at the *jumma* of 1,351 rupees, in the name of *Khwajah Mahomed Sumee;*" and in the Book 1207 *Fusly* (A.D. 1799–1800), the *mehals* in question are set down at the same *jumma* "in the name of *Bebee Sifut*, wife of the *Khwajah*," and then in 1211 *Fusly* (A.D. 1804), "in the name of *Malik Mocurrerydar.*" In the Report of the 11th of *August*, 1824, there is a statement of the *jumma* at which the *Pergunnah* of *Suresa* has been held for periods long antecedent to those to which we are referring. And in that report the *jumma* of Rs. 1,351 commences in the year 1780–81, carrying it back through a few years beyond the period to which the Respondent's evidence extended.

The same documents show that in the year 1803–4, Rs. 458. 12a. were added to the *jumma* for the one-fourth share of the resumed *mocurrery* of *Baboo Surupjeet Sing*. That appears from the Report of 1806. In the settlement book of 1207 *Fusly*, about *Pergunnah, Kusma*, it is stated in that Report that "the Government revenue of the salt *mehals* of this *Pergunnah* in the *Wasil baky* of 1213 *Fusly* is inserted at a *jumma* of Rs. 1,809. 12a." Then it appears upon the evidence that the salt *mehals* of *Suresa* were thenceforth (that is, from 1803–4) held at Rs. 1,809. 12a. up to 1819, and were recorded in the name of *Bebee Sifut* until the year 1806, and afterwards in the name of *Burkut-oon-Nissa*, her daughter and heir. This is what appears in the documents, independently of the *sunuds*, in reference to *Pergunnah, Suresa.*

As to *Pergunnah, Kusma*, the case as it appears upon the documents above referred to, is somewhat different. The fixed *jumma* of Rs. 254. 0a. 1p. for this *Pergunnah* does not appear upon the documents put in by the Respondent at any time before the year 1804, when it is found in the *Kistbundy* of the 21st of *January*, in that year, in connection with an allowance to *Rajah Mudho Sing*, and a charge for impressing the seal, amounting together to Rs. 38, making the total payment for this *Pergunnah*, of Rs. 292. 0a. 1p., and then the Government demands Rs. 254. 1p. allowance to *Rajah Mudho Sing*, at 2 per cent.; *Sud-doee* Rs. 26, *Mohrana*, for impressing the seal, Rs. 12, making Rs. 38 additional, and bringing it to Rs. 292. 1p., which is stated at the head of the document as the amount of the *Kistbundy*. The *jumma* of Rs. 254. 0a. 1p. is however carried back for two or three years; the same thing happened with respect to *Pergunnah, Kusma* as happened with respect to *Pergunnah, Suresa*. The *jumma*, which is contended to be the fixed *jumma*, is carried back by the Report of 1824, a few years before the period to which the Respondent's evidence had carried it, and the payment of it was continued to the year 1817.

It further appears from another Report of the 25th of *May*, 1820, that on the 2nd of *July*, 1806, *Perwannahs* were issued for ejecting the name of *Bebee Sifut* from the Records, and inserting in lieu thereof the name of *Burkut-oon-Nissa*, and for giving her the receipt and account as *mocurrery* holder. In the preceding passage it is stated, "In accordance to which two *Perwannahs* were written, dated the 2nd of *July*, 1806, one in the name of *Mirza Furzund Uli, Tahsilder* of *Pergunnah, Suresa*, directing that agreeably to the petition of *Rampurshad, Mokhtar* of *Mus-*

1854.

THE BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN

unat Bebee Burkut-oon-Nissa Begum, daughter of *Bebee Sifut*, wife of *Khwajah Mahomed Sumee*, deceased, the name of *Bebee Sifut* should be erased from the Records, and in lieu thereof, the name of *Mussumat Burkut-oon-Nissa Begum*, heir of *Bebee Sifut*, deceased, be recorded, and to receive the revenue from her;" and in addition to what has been above mentioned, there is a decree of 1812, in a suit brought by *Burkut-oon-Nissa*, against one of the *Nooneeahs*, in which it is stated, that from the documents filed in the case it appeared that the *mocurrery istimrary* (perpetual salt *mehal*) belonged of old to the Plaintiff, *Burkut-oon-Nissa*, as her inheritance.

There is also a very important document, being a proceeding of the Collector of *Tirhoot*, dated the 30th of *June*, 1813, in which, upon a tender being made to farm some salt *mehals*, including those of *Suresa* and *Kusma*, the Collector refused the tender, upon the ground, amongst others, that the salt *mehals* of *Suresa* and *Kusma* were the *Mocurrery istimrary* tenure, of which the *jumma*, apart from farming engagement, was in the name of *Burkut-oon-Nissa*, daughter of *Khwajah Mahomed Sumee*, and there appears to have been a proposal by other parties for these *mehals*, at an increased *jumma*; and the statement is, "As the petitioners have presented a tender for the farm of the salt *mehals*, at the *jumma* of Rs. 30,500, and the salt *mehals* of *Pergunnahs*, *Suresa* and *Kusma* are the *mocurrery istimrary* tenure, of which the *jumma*, apart from *Theekadaree* (farming engagement), is in the name of *Burkut-oon-Nissa Begum*, daughter of *Khwajah Mahomed Sumee*, deceased." The decision come to being, that the tender of the farm, therefore, cannot be accepted.

This proceeding of the Collector appears to have

been adopted by the Government, as will be found by the report on the *Numuk sayer mehal*, under the date of the 27th of *October*, 1815. This is a very elaborate Report upon the subject of the *Numuk sayer mehal*. It refers to another report, dated the 17th and 18th of *August*, 1813, in which there is this statement; "The Collector having again submitted reports on the subject of offers made to engage for the *mehals*, and having at the same time suggested that the balances should be recovered from officers attached to the Commercial Presidency at *Patna*, who, there was reason to believe, had been concerned clandestinely in the late farm; the Board furnished him with instructions to the following purport, with respect to the tender made by *Rogooram Bhooder*, &c.; the Board were disposed to accept their offers (exclusive, however, of the *mehal* situated in the *mocurrery* of *Burkut-oon-Nissa* and *Setarum*, which was included in their offer." So that the Government appears to have adopted the report of the Collector of *Tirhoot*, of *June*, 1813.

It is to be observed, however, that this same Report of the 27th of *October*, 1815, notices a Report of a former Collector, of the 2nd of *May*, 1801, which stated, that the salt *mehals* were farmed in *Pergunnahs*, *Suresa* and *Kusma*, distinguishing those *Pergunnahs* from *Tonkee*, in which the *mehal* was stated to be claimed as *mocurrery*. And, in *October*, 1815, it is stated in the report of the Collector that "it was let in farm in the following year, that it was also farmed in *Pergunnahs*, *Suresa* and *Kusma*; in *Tonkee* it was claimed as *mocurrery*;" making a distinction, therefore, between it being farmed in *Suresa* and *Kusma*, and its being claimed as *mocurrery* in *Tonkee*.

It is to be observed, also, that the Report of the

1854.

THE BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN.

5th of *May*, 1820, states, that in the Settlement book of 1211 *Fusly* (A.D. 1803–4), a fourth share of the salt *mehal*, the resumption of *Baboo Surupjeet Sing*, is recorded as the *khâs* tenure, at a *jumma* of Rs. 458. 12a.

It is further to be remarked that there is not in evidence any *Wasil baky* account of that year or the following year, and that the report of 1824, which purports to be founded on the *Pareenah* and *Amanat dufter* papers, shows the *jumma* of the salt *mehals*, both of *Suresa* and *Kusma*, to have been fluctuating as to *Suresa* up to the year 1780, and as to *Kusma* up to the year 1795.

Again, it is to be remarked, that in the Settlement books of 1789–90 and 1799–1800, *Bebee Sifut* is described as farmer of the *Numuk sayer mehal*. The description in the Settlement books is, "Farmer, wife of *Khwajah Mahomed Sumee Mocurrerydar*." And she is also mentioned as *Theekh-daree*, and not *Malik*, in the proposed *Theekh-daree jumma* of 1799.

In the argument on the part of the Respondent, some reliance was placed upon the alleged discrepancy between the Collector's Reports of 1820 and 1824; the Report of 1820 stating, that there had been an increase in the *jumma*, and the latter part of that Report stating, that "no increase or decrease ever appears to have taken place in the *mocurrery jumma* in question, and in the files in question, copy of the *sunud* does not appear." But the difference between these Reports does not appear to their Lordships to be entitled to much weight, for the Report of 1820 is based on the records of the Collector's office, and does not refer to the *Amanat dufter* papers. And, besides, it seems to be confined to the period subsequent to 1789, and not to have extended back to the earlier periods to which the Report of 1824 is addressed.

It seems probable that there would be no accounts in the Collector's office of a date prior to 1789.

Their Lordships feel that it would be difficult, upon the materials to which they have already adverted, to arrive at any satisfactory conclusion upon the question before them. On the one hand, the proceeding of the Collector in 1813, adopted, as it would seem, by the Government, affords very cogent evidence that the salt *mehals* of these *Pergunnahs* were always held at a fixed *jumma*. And the other documents fix the amount of the *jumma* at which they were held for a considerable period. But, on the other hand, the Report of 1824 shows the *jumma* of these *mehals* to have been fluctuating in more early times. It was, indeed, urged on the part of the Respondent that no credit ought to be given to the Report of 1824; that its discrepancy from the Report of 1820 of itself disentitles it to credit; and that it is, moreover, a document compiled in the office of Government from materials which have not been authenticated or even produced in the cause. It has been already observed, that but little weight can, in the opinion of their Lordships, be attached to the discrepancy between the Reports of 1820 and 1824. And, before yielding to the Respondent's other objections to the Report of 1824, it is material to consider the nature and history of the documents on which that Report purports to be founded, and how the statements contained in it are affected by the other evidence in the cause.

This Report is the report of the Record Keepers of the Collectorate of *Tirhoot*, and it purports to contain a detailed account, taken from the *Amanat dufter* papers of the *jumma* of these *mehals*, as to *Suzesa*, from 1736, the date of the earliest of the *sunuds*, to

1854.

THE BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN.

which we shall presently refer; and as to *Kusma* from 1762, an account which is also to be found in the answer of the Government, and in the letter of the Collector of *Tirhoot* to the officiating Commissioner of Revenue, dated the 16th of *June*, 1831.

Now the *Amanat dufter* was an office for the deposit of revenue records during the Mahomedan rule, and the *Amanat dufter* records are referred to in the Report of 1813, on the affairs of *India* (the 5th Report). These records were, as their Lordships have ascertained by inquiries which they have caused to be made, transferred to the officer of the Board of Revenue at *Calcutta*, and the Report of 1824 speaks of the *Amanat dufter* papers, and also of the *Pareenah* papers (other old records), to which it refers as having been received from the Board. There is every reason, therefore, to believe, that these papers were in the office in which the Report of 1824 was compiled, and were derived from the proper custody. But still the results derived from them may not have been correctly deduced. And with a view to this question it is material to look at the other evidence in the cause.

Upon examining, then, the other evidence, it appears, that all the documents which the Respondent has produced, whether *Wasil baky* papers (that is, papers signed by Government officers, stating the sums collected and balances outstanding), or *Kistbundies* given by the parties to Government, so far as they go back, agree with the details taken from the *Amanat dufter* papers. But the Respondent has produced evidence as to *Suresa* only so far back as 1785, and as to *Kusma* only so far back as 1803-4. As far as the evidence goes back, there is no disagreement between the *Wasil baky* and *Kistbundy* documents on the one hand, and the *Amanat dufter* papers on the other.

It is in the more early period to which the *Wasil baky* and *Kistbundy* papers do not extend, that the difference in the amount of the *jumma* is to be found, and as to that period the Respondent has produced no evidence. The importance of producing such evidence cannot have been overlooked by the Respondent, for the statements of the Report are at variance with the existence of the fixed *jumma* contended for; and the opportunity of producing the evidence was not wanting; for the Report of 1824 was filed in Court, in the month of *August* in that year. And long after that period, when the cause was heard before the *Zillah* Judge, in 1837, a great mass of evidence was produced on the part of the Respondent.

In this state of circumstances, their Lordships feel that it is impossible to disregard the Report of 1824, and that the most which could be done with reference to that Report would be, to send the case back for further inquiry, if, upon the whole evidence taken together, no satisfactory conclusion could be arrived at.

This brings us to the consideration of the *sunuds*, and the matters more immediately connected with them. It appears, from the year 1816, the subject of the salt *mehals* was much considered by the Government of *India;* and the inquiries as to the salt *mehals* of these *Perygunnahs* were set on foot by Mr. *Deane*, the Commissioner of *Behar* and *Benares*. Some documents were produced on the part of *Burkut-oon-Nissa* upon the occasion of this inquiry, and it was contended on the part of the Respondent that both the *sunuds* in question were, or, at all events, that one of them was, at this time produced to Mr. *Deane*. The letter of the 27th of *February*, 1817, was relied upon

1854.

THE BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN.

in proof of such production. It is a letter addressed by the acting Secretary of *Tirhoot* to Mr. *Kennedy*, the Superintendent of the *Numuk sayer mehal*, and it is in these terms: "Sir, The Commissioner having had before him the case of the *Numuk sayer mocurrery* in *Pergunnahs, Suresa* and *Kusma*, and also in *Nagurbusee* in *Zillah, Tirhoot*, and being of opinion, as well from the documents produced by *Noor-ool-Husun Khan*, the heir of *Burkut-oon-Nissa Begum*, in whose name the *mocurrery* is held, as from the nature of the *mehal* itself, that the original *mocurrery sunud* said to have been granted to *Ubd-ool-Ghunee*, if authentic, was not intended to be perpetual, and cannot be binding on Government, and that the continuance of the *mehal* to his successors was never confirmed by or notified to Government, and that it ought consequently to have been resumed on the death of the first incumbent; I am directed to desire that you will resume the *Numuk sayer* comprehended in the said *mocurrery*, and proceed to make a settlement thereof, in conformity to the general rules with which you were furnished on the 30th of *December* last in regard to the *Numuk sayer*."

It was contended on the part of the Respondent, that it appeared from that document that either both the *sunuds*, or one of them, were or was produced. But when the document comes to be examined, it is found that the document was merely to refer to an original *mocurrery sunud* as having been said to have been granted to *Ubd-ool-Ghunee*. The expression is, that he is of opinion, "as well from the documents produced as from the nature of the *mehal* itself, that the original *mocurrery sunud* said to have been granted to *Ubd-ool-Ghunee*, if authentic, was not intended to be

1854.

THE BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN.

perpetual." It refers, therefore, to an allegation having been made of the existence of such a *sunud*, and not to any such *sunud* having been produced. And the examination of *Burkut-oon-Nissa's Vakeel* proves that no such *sunud* was then produced. That examination is as follows: "When, according to Section 25, Regulation XIX., 1793, a proclamation was issued calling for *sunuds*, why did you not then produce your alleged *mocurrery sunud* on which you found your claim?" The answer is, "There was no notice or proclamation issued in the name of my client; consequently, the *sunud* was not produced;" showing, therefore, that at that time the *sunud* was not produced.

Under these circumstances, the Government, in *February*, 1817, resumed the salt *mehals* of these *Pergunnahs*. And here the matter appears to have rested until *July* in that year, when an instrument was registered purporting to be a *sunud* of the year 1745, under the seal of *Zyn-ood-deen Ahmud Khan*. This instrument is in these terms:—"*Moatsuddies* present and future, of *Pergunnah*, *Suresa Surkar Hajeepoor*, appendant to *Soobab Behar*. Be it known to you, it is come to knowledge that the salt villages of *Pergunnah* aforenamed, bearing assessment of Rs. 1,809 annually, agreeably to *sunud* of former *Nazims*, is an *istimrary mocurrery* grant (or a grant in perpetuity, on a fixed *jumma*) in the name of *Khwajah Ubd-ool-Ghunee*, with descendants; consequently, the estate in question, bearing assessment as aforenamed, has been continued and confirmed as before, from the 1150 *Fusly*, to the *Khwajah* aforenamed, and descendants. You are hereby desired, that on account of *abwab* (cesses), *behriat* and *furmayushat* (presents or

1854.

THE BENGAL GOVERNMENT v. NAWÁB JAFUR HOSSEIN KHAN.

orders), *i-purgunatee*, &c., you will make no demand whatever, or cause any interference with and in the estate in question, so that the *Khwajah* aforenamed, by paying the fixed assessment to Government, might enjoy the *mocurrery* in question."

It is to be observed, therefore, that this purports to be a *sunud* confined to *Suresa* entirely, and to be a confirmation of a previous grant of the salt *mehal* of *Suresa*, in favour of *Khwajah Ubd-ool-Ghunee*, and his descendants, at a perpetual fixed *jumma* of Rs. 1,809. But no such previous grant was then registered. The registration of the *sunud* of 1745 was followed by a petition presented in *March*, 1818, for a reconsideration of the case. But nothing appears to have been done upon this petition; and the next step in these proceedings appears to have been that of the 3rd of *September*, 1818, when the plaint in the suit was filed by *Burkut-oon-Nissa Begum*, for the recovery of the salt *mehals* of these *Pergunnahs*, with mesne profits received by the Government.

Up to this time there is no trace upon the evidence of any *sunud* having been brought forward, except the alleged *sunud* of 1745. It is true, indeed, as was pointed out on the part of the Respondent, that the plaint speaks of "*sunuds*." The language of the plaint is, "My client's great grandfather came from *Cashmere* to this country, and established a saltpetre factory, and, under considerable outlay, established and obtained salt *mehals* in the *Pergunnahs* aforenamed, and obtained from the former *Nazims*, *istimrary mocurrery sunuds* for the same, as a grant to himself and posterity." No doubt, therefore, the plaint refers to one of the *sunuds*; but it is to be observed, that the plaint does not specify the *sunuds*, and it is clear that

If the Respondent had any title, it could be by *sunud* only; and there must be more than one *sunud*, as the alleged *sunud*, which had been registered, extended only to *Suresa*, and was, moreover, a *sunud* of confirmation only. It does not appear, therefore, that any reliance can justly be placed upon this expression in the plaint.

The suit appears to have lingered for some time after its institution. But in *March*, 1819, the alleged *sunud* of 1745 was produced to the Officer of salt *mehals*, and this was followed by a proposal for compromise in *May*, 1819. I do not think it necessary to go through the document. It appears that there was this proposal of compromise. This proposal was communicated to the Board of Revenue by a letter dated the 16th of *July*, and was rejected by them by a letter of the 10th of *August*, 1819. These letters are of some importance, as a good deal was said upon the subject of them in the argument.

The letter of the 16th of *July*, 1819, contains this paragraph:—"I have the honour, likewise, to forward to your Board herewith a copy of the plaint filed by the *Mocurrerydar* in the *Patna* Court, upon an examination of which, together with that of the original *sunud*, which accompanied my letter of the 28th of *March*, it will be for your Board to decide whether it may not be more advantageous to the interests of Government to relinquish the *Pergunnahs* in question on the terms offered, than to run the risk of the Plaintiffs obtaining a decree in Court, which would unquestionably be followed by a demand of restitution of all that I have hitherto collected, and perhaps by an action for damages in having attached the *mehal* unjustly. The question of right on their part rests, I

1854.

THE BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN.

conceive, entirely on the validity of the *sunud*, of which I have already expressed my doubts; for it is a circumstance certainly liable to create suspicion, that at the time Mr. *Deane* called on the *Begum's Mokhtar* (*Meer Juafur Shah*) to produce any document he might possess which would tend to support or establish her claims, the *sunud*, the most important document he could bring forward, was not produced, and stated by him not to be found; yet from the date of registry affixed to it, compared with the date of the Commissioner's order to me, on the subject of the resumption, your Board will perceive that there is not a greater difference than two or three months."

Then the letter of the 10th of *August*, 1819, is in these terms:—"The *Numuk sayer mehal* of *Pergunnahs*, *Suresa*, *Kusma*, and *Nagurbuses* was formerly held under a *mocurrery* and *istimrary sunud* by *Ubd-ool-Ghunee*, from whom it descended to the late *Burkut-oon-Nissa Begum*; after whose death, in consequence of no valid title having been produced by her heir, the *mehal* was ordered to be resumed by the late Commissioner; but since that time the heir has produced a document purporting to be a *sunud*, under the seal of *Zyn-ood-deen Ahmud Khan*, which confirms to *Ubd-ool-Ghunee*, '*ba furzundan*,' a former *mocurrery* and *istimrary* grant said to have been made to the above person. There is nothing in the *sunud* itself which leads one to suspect its being a forgery; but its not having been produced with the documents brought forward when the late Commissioner called for the titles of the heir of the late *Burkut-oon-Nissa Begum*, affords strong grounds for suspecting the validity of it." Then he goes on to state other grounds

which might lead to suspicion of the validity of the document.

These letters were relied on by the Respondent as evidence that not only the alleged *sunud* of 1745, but also the alleged *sunud* of 1735, had then been produced, and they were relied upon also upon this ground, that the letter of the 10th of *August*, 1819, refers not only to the *Numuk sayer mehal* of *Suresa*, but also to that of *Kusma*, which is not mentioned in the alleged *sunud* of 1745. But it is observable, that the letter of the 10th of *August*, 1819, is in answer to the letter of the 16th of *July* of that year, which clearly refers only to the *sunud* of 1745, and that the letter of the 10th of *August*, when it refers to what had been produced, refers to that *sunud* only. It says, "Since that time the heir has produced a document purporting to be a *sunud* under the seal of *Zyn-ood-deen Ahmud Khan*," which clearly is the *sunud* of 1745. And the reasonable interpretation of the part of that letter which refers to *Kusma*, seems, therefore, to be, either that *Kusma* was considered to be included in *Suresa*, or that the passage referring to *Kusma* had reference to the claim which had been made, and not to the evidence which had been adduced in support of it. The question of the validity of the *sunud* must indeed at this time have been deemed to be of little importance, as the Government had been advised that the grant produced, whatever it may have been, had determined.

The proposal for compromise having been rejected, the suit proceeded. The Government put in their answer, by which they insisted, amongst other things, that the *sunud* produced (meaning, as clearly appears by the context, the *sunud* of 1745) could not be

1854.

THE BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN.

relied on. The Respondent replied, and, in the replication, undoubtedly referred to some *sunud* different from that of 1745, and containing more extensive words of inheritance. But still there was no mention in terms of the *sunud* of 1735. When, however, the cause was at issue, the first document produced on the part of the Respondent was an instrument purporting to be a *sunud* of the year 1735, under the seal of *Mahomed Ali Wurdee Khan.*

In the Respondent's case we have that *sunud*, and it is in these terms—"To the officers present and future of *Pergunnahs*, *Suresa* and *Kusna*, *Surkar*, *Hajeepoor*, *Muyaf*, *Sooba*, *Behar*, be it known. As the honest *Khwajah Ubd-ool-Ghunee* has established salt *mehals* in the *Pergunnahs* aforementioned, and has brought *Qulumee Shorah* (saltpetre) into use, and has petitioned that some arrangement may be made, so that he might pay the yearly revenues to Government, and enjoy the profits himself, and his posterity after him, generation after generation, and which arrangement should be free from, and not susceptible to, any change or alteration in future: adverting, therefore, to his right and to his good management, the *mehal* in question has been settled at an equal and fixed *jumma* of Rs. 2,063. 1p., in the name of *Khwajah Ubd-ool-Ghunee* as a *mocurrery istimrary*, fixed (permanent) tenure, to continue to him and to his children and dependents (relatives) in perpetuity, without any specification of name or division, so that himself and his children and dependents (relatives), generation after generation, might possess and enjoy the *mehal* in question to their full and entire satisfaction, and pay yearly the *mocurrery jumma* into the Government Treasury, and enjoy the profits. The *Khwajah*

aforenamed, and his children and dependents (relatives), being considered as fixed *Mocurrery Istimrary-dar*, should suffer no change and alteration in the tenure, and also be subject to no increase or any other demand for cesses, requisitions (as presents), and *behree* (charge for any requisite expenses, &c.)."

It may as well be observed here, that the Government had been advised, that the *sunud* of 1745 did not contain words of inheritance sufficiently ample to carry the property to the descendants of *Khwajah Ubd-ool-Ghunee*, and that that circumstance had been communicated in the meantime to the Respondent, and that communication had been made anterior to the production of this *sunud* of 1735.

That document being put in, there can be no doubt that this instrument, if genuine, was sufficient to entitle *Burkut-oon-Nissa* to the salt *mehal* of these *Pergunnahs*. That has not been denied at the bar. But this cause was first tried before a Special Commissioner, and he discredited both this alleged *sunud* and the alleged *sunud* of 1745. And, it having afterwards appeared that the Special Commissioner had no jurisdiction, the cause was again tried before the Judge of the *Patna* Court, who arrived at the same conclusion as to the authenticity of these alleged *sunuds*. Upon an appeal from this last decree, however, the Judges of the *Sudder* Court have held these alleged *sunuds* to be valid, and we have now to determine between these conflicting opinions.

That these alleged *sunuds* have been brought forward under circumstances of very grave suspicion, admits of no question. But to reverse the Decree of a Court upon the ground of suspicion merely, would be going much too far. There are, however, facts in

1854.

THE BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN.

this case which appear to their Lordships to be irreconcileable with the authenticity of these *sunuds*. As to *Suresa*, the alleged perpetual *jumma* is, according to the *sunud* of 1745, Rs. 1,809; but, according to the Respondent's own evidence (without reference to the doubt thrown upon it by the Report of 1824), the *jumma* of the three-fourths up to 1803–4 was Rs. 1,351; and in 1803, Rs. 458. 12a. were added for the one-fourth resumed *mocurrery* of *Baboo Surupjeet Sing*, thus making the total *jumma* to amount to Rs. 1,809. 12a. There is no explanation of this difference of 12 anas in the amount of the *jumma*. But there are still more important considerations affecting this resumed one-fourth. The Respondent's position is, that this one-fourth was one-fourth of the Government revenue granted out to *Baboo Surupjeet Sing* for life. But the grant to *Baboo Surupjeet Sing* was, or appears to have been, at least, in the year 1763–4. And if there had been a previous grant in 1735 or 1745 of the entire revenue, at Rs. 1,809, how could the one-fourth granted in 1763–4 amount to Rs. 458. 12a., the one-fourth of Rs. 1,809 being only Rs. 452. 4a.? It thus appears, that this resumed one-fourth was not one-fourth of the Government share, and this is confirmed by the *Kistbundy* of 1804, in which the fourth is mentioned as a fourth share, in contradistinction to the three shares of *Nizamut*. Again, in the *Amanat dufter* papers relating to the fourth share of *Baboo Doorg Begah Sing* and *Baboo Surupjeet Sing*, the *mocurrery jumma* of the salt *mehal* of the fourth is set down at Rs. 125 only, and a subsequent *sunud*, in which it was recorded at Rs. 435, was set aside, as not corresponding with these *Amanat dufter* papers. And it would appear, there-

fore, that if the *jumma* of Rs. 458 was paid to *Baboo Surupjeet Sing*, of which, however, no evidence has been given on the part of the Respondent, it must have been so paid in increase of the *jumma* at which he held, and by an arrangement with him quite independent of the *jumma* which he paid. As to *Pergunnah, Kusma*, too, the payment of the revenue to the Government appears to have been commenced only upon the resumption from *Rajah Raj Bullub*, in 1803. And if there had been a previous grant of the salt *mehal* of this *Pergunnah*, at Rs. 254. 0a. 1p., how is it to be accounted for that in the *Kistbundy* of 1803, the Respondent submitted to be charged with the allowance of Rs. 26, in favour of *Rajah Madho Sing*, and also with other charges which are contained in that *Kistbundy ?*

These, and the other facts of this case, lead their Lordships to the conclusion, that the *sunuds* of 1735 and 1745 are not authentic. They are the documents on which the Respondent has alleged the *istimrary* tenure to be founded, and having alleged it to rest upon them, and having failed to make good that allegation, he must abide by the failure, and is not, in our opinion, entitled to resort to any presumption which possibly might otherwise have been made, although it would be difficult to raise a presumption on a question of this nature, the question being, not whether the *mehal* is rent free, but whether a rent admitted to be due has been permanently fixed.

Having arrived at this conclusion as to the validity of the *sunuds*, it is unnecessary for their Lordships to give any opinion upon the questions which were discussed in argument, whether the *Numuk sayer mehals* has been wholly abolished, and whether the

1854.

THE BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN.

Government have, in any event, the right to resume by virtue of their Sovereign power. Their Lordships give no opinion upon those points. The Judges of the *Sudder* Court appear, however, to have considered that the question in this case was set at rest by the Decennial Settlement, that the settlement then entered into with the ancestor of the Respondent became permanent and perpetual, under Reg. VIII. of 1793. But that Regulation seems to their Lordships to relate to the land revenue, and to settlements concluded with the actual proprietors of the soil, and to have no relation to the *Numuk sayer mehals*, or any settlement made in respect of it with persons who were not proprietors of the soil, and neither the late nor the present Respondent appears to have been proprietor of the soil. Our opinion, therefore, differs from that of the Judges of the *Sudder* Court upon this point.

It has not escaped their Lordships' attention, that in one of the precedents cited in this case, it was intimated that the word "*Mocurrery*" may import perpetuity. But their Lordships apprehend that, although it may have that import, this is not the necessary meaning of the word, and they are satisfied that, as used in the documents in this case, it has not that import.

Upon these grounds their Lordships' recommendation to Her Majesty will be, to reverse the Decree of the *Sudder* Court, and the subsequent Orders founded upon it, and to restore the decision of the *Patna* Court, dismissing the Respondent's claim, with costs. But their Lordships think that the case has been involved in so much obscurity by the proceedings on the part of the Government and its officers, that there was enough to justify the appeal from the Decree of the *Patna* Court, and that no costs ought to be given

subsequent to that Decree. I am not sure whether the costs have not been paid, and, if so, they must be refunded and set right.

1854.

THE BENGAL GOVERNMENT v. NAWAB JAFUR HOSSEIN KHAN.

IN RE THE NAWAB OF SURAT.*

On petition from Bombay.

30th June, 1854.

THIS was an application for leave to appeal against an adjudication of the Governor of *Bombay*, founded on an award made under an Act of the Legislative Council of *India*, No. 18 of 1848, for the administration of the private estate of the late *Nawab* of *Surat*, which arose under the following circumstances:—The Petitioners were *Meer Jafur Alee*, the son-in-law of *Meer Ufzooloddeen Khan*, the late *Nawab* of *Surat*, and father of *Zeeoon-nissa Larlee Begum* and *Ruheemoon-nissa Begum*, infants (the grandchildren of the late

An Act of the Legislature of *India*, No 18 of 1848, empowered the Governor in Council of *Bombay* to administer the private estate of the late *Nawab* of *Surat*, and it was, by section 2, enacted, "that no act of the said Governor of *Bombay* in Council in respect of the administration to, and distribution of, such property, from the date of the death of the said *Nawab*, should be liable to be questioned in any Court of Law or Equity." No provision was made for an appeal from the Governor's decision. In pursuance of the power conferred by this Act, the Government agent at *Surat*, to whom the matter was referred, made an award distributing the estate in certain shares, among the heirs of the deceased, which award was confirmed by the Governor in Council.

Upon an application by a claimant dissatisfied with the award to the Judicial Committee, for leave to appeal from the Governor in Council's confirmation of the award. Held, that the award was not such a judicial act as to come within the operation of sec. 3 of the Statute, 3rd & 4th *Will.* IV, c. 41, or the 7th & 8th *Vict.*, c. 69, and could not be entertained by the Judicial Committee without a special reference to them by the Crown, under section 4 of the Statute, 3rd & 4th *Will.* IV., c. 41.

* Present: Members of the *Judicial Committee*,—The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, Knt., the Lord Justice Turner, the Right Hon. Sir John Patteson, Knt., and the Right Hon. Sir John Dodson, Knt.

1854.

IN RE THE NAWAB OF SURAT.

Nawab), and *Ameer-oon-nissa Begum*, the widow of the deceased *Nawab*.

It appeared from the petition, that *Meer Ufzooloddeen Khan*, from the year 1821 until his death, enjoyed the dignity and immunities of *Surat* with the sanction of the British Government in *India*, under the provisions of certain articles of agreement, entered into on the 13th of *May*, 1800, between the East India Company and *Nusseeroddeen Khan*, the father of *Ufzooloddeen Khan*, whereby, in consequence of his surrendering up to the East India Company the civil and military government of *Surat*, it was provided, that he should continue exempt from the jurisdiction of the Courts of Justice, and should be at liberty to dispense justice over his relations or servants. *Meer Ufzooloddeen Khan* died on the 8th of *August*, 1842, leaving no son surviving him, and the title was declared extinct, and the property taken possession of by the Government. On the 26th of *August*, 1848, an Act of the Legislature of *India*, No. XVIII., entitled, "An Act for the administration of the estate of the late *Nawab* of *Surat*, and to continue privileges to his family," was passed, which invested the Government of *Bombay* with power to administer the private estate of the deceased *Nawab*, and after settlement and payment of the claims against the *Nawab*, at the time of his death, to make distribution of the remainder among his family. Among the claimants to the property, as heirs, were the Petitioner, *Meer Jafur Alee*, and his two daughters, who claimed the whole estate. The agent for the Government, Mr. *Frere*, to whom the matter was referred, by his award, was of opinion, that there was no proof of a custom in the family of the late *Nawab*, by which his children were exclu-

sively entitled to the whole property, and that it was not proved that it was the intention of the late *Nawab* to constitute any particular person to the exclusion of those who would be heirs under the rules of the Mahomedan law of succession; and he, therefore, decreed that the property should be divided into sixteen shares, and awarded eight shares to *Meer Jafur Alee's* two daughters, and the other eight shares among the other relations of the deceased *Nawab*.

The Petitioner, *Meer Jafur Alee*, on behalf of his daughters, appealed to the *Bombay* Government against the above award, insisting, that it was against the late *Nawab's* intentions. On the 27th of *July*, 1853, the Government of *Bombay* informed the Petitioner that, on a full consideration of the appeal preferred by him on behalf of his daughters, against Mr. *Frere's* decision, they had, under section 2, of Act 9, No. 18, of 1848, adjudged the succession as follows: to his daughters, four shares each, to the *Nawab's* widows, one share each, and to the two great grandsons of the *Nawab's* great grandfather's brother in the male line, three shares each, and thus confirmed the award. After an ineffectual application to the Board of Directors of the East India Company for a review of the case, the Petitioners presented a petition to Her Majesty in Council for leave to appeal, and for a reference of the petition to the Judicial Committee. The petition was in the ordinary form, but the Registrar of the Privy Council being doubtful whether it was within the provisions of the Privy Council Act, 3rd and 4th *Will.* IV., c. 41, sec. 3, the present application was made to their Lordships for leave to appeal.

1854.

IN RE THE NAWAB OF SURAT.

The Solicitor-General (Sir *Richard Bethell*), and Mr. *Ayrton*, supported the motion.

We insist that the confirmation of the award by the Governor in Council, under section 2, of the Act of the Legislature of *India*, No. 18 of 1848, was of a judicial, and not a Sovereign character, and the proper subject of an appeal to the Queen in Council. It was similar to the judicial functions formerly exercised by the Governor-General, under the powers of the Statute, 21st *Geo.* III., c. 70, sec. 21, from whose award or decision an appeal to the King in Council was as of course. The jurisdiction of the President and Council, as a Court of appeal, was abolished by Statute, 37th *Geo.* III., c. 142, sec. 18, and the *Bombay* Charter founded upon that Act provides for an appeal to the King in Council from the Supreme Courts, thereby created. Statute, 47th *Geo.* III., sess. 2, c. 68, sec. 1, empowers the *Bombay* Government to make laws and regulations for the good order of the town of *Bombay*, but an appeal is given by sec. 2. So *Bom.* Reg. IV. of 1827, ch. 23, cl. 10 (*Bom.* Code, p. 159), expressly provides, that there shall be no bar to the full and unqualified exercise of Her Majesty's pleasure, in receiving or rejecting appeals from the *Sudder* Courts. Although it is enacted, that the award is not to be questioned in any Court of law or equity, yet that cannot deprive a subject of the right of appeal to the Sovereign. There are no restrictive words taking away an appeal, and we insist that an appeal lies to the Judicial Committee as now constituted, the same as an appeal lay from the President and Council to the King in Council, before the passing of the Statute, 37th *Geo.* III., c. 142. The recognition of the Sovereign character

of the *Nawab* of *Surat*, and the exemption of himself, family and servants, by *Bom.* Reg. II., of 1827, sec. 21, cl. 2, from the cognizance of the Civil Courts of Justice, are not unfrequent in *India*. *Bom.* Reg. XVII. of 1827, sec. 29, cl. 2. The fact of the Government making the *Nawab*, as it were, *solitus lege*, has created this anomalous position.—[The Lord Justice *Knight Bruce:* Does any objection arise upon that point? Is not the question confined to this,—Is the award such a judicial proceeding as comes within the appellate jurisdiction of the Judicial Committee, conferred upon them by the 3rd & 4th *Will.* IV., c. 41, sec. 3? which authorizes them to entertain appeals from any "determination, sentence, rule, or order of any Court, Judge, or judicial officer." If it is not embraced in these words as a judicial act, then we can only entertain the matter by a special reference to us by the Crown, under the fourth section of that Act. Under that section the Crown has power to refer any matter to the Judicial Committee for their advice.]—An appeal was entertained by this Court from an award made by the *Bombay* Governor in an analogous case of heirship. *Luximom Row Sadasew* v. *Mullar Row Bajee* (*a*). This is clearly a judicial act. It was a tribunal established by an Act of the Legislature of *India* to determine rights of heirship, and in this country the entry of it might be brought up by *certiorari*. *The Queen* v. *The Aberdare Canal Company* (*b*). Even if a Statute directed a Court to hear and finally determine, it does not, in the absence of express words, take away the *certiorari*, as it is, in the language of Lord *Kenyon*, "a

(*a*) 2 Knapp's P. C. Cases, 60. (*b*) 14 Q. B. Reps. 854.

1854.

IN RE THE NAWAB OF SURAT.

beneficial writ for the subject." *The King* v. *Jukes* (*a*). The Act of 1848 was never intended to interfere with the right of appeal to this Court, which has more extensive powers than the Court of Queen's Bench.

The Lord Justice KNIGHT BRUCE:

The late *Nawab* of *Surat*, having been placed in a peculiar position with reference to the Government of *Bombay*, by reason of the consideration shown him by that Government, in consequence of rights of Sovereignty, which, whether theoretically by delegation, or otherwise, he had in fact substantially exercised; he was placed, I say, in a particular position by law with reference to that Government, and to a certain extent, to use the expression of the Solicitor-General, was "*solitus lege*" himself, and placed as a law over his immediate family and dependents; a state of things which existed at his death. Some difficulties appear to have arisen upon that event; and, in consequence, some years after his death in 1848, an Act of the Supreme Legislature of *India* was passed to this effect: it is entitled "An Act for the administration of the estate of the late *Nawab* of *Surat*, and to continue privileges to his family." It recites that "it is expedient to provide for the administration of the estate of the late *Nawab*." It then recites, that "the exemption from the jurisdiction of the Civil and Criminal Courts, enjoyed by the said late *Nawab* and his relations and servants, by virtue of the treaty concluded between the East India Company and the said late *Nawab* on the 13th *May*, 1800, recognised and confirmed by clause 2, section 21, Regulation II., 1827,

(*a*) 8 Term Rep. 544.

and clause 2, section 1, Regulation XI., 1827, of the *Bombay* Code, ceased at the death of the said late *Nawab*, and it is deemed expedient that some of the said persons should continue to be privileged." It then enacts, that "No writ or process shall be sued forth or prosecuted against the person, goods, or property of the said several persons named in the schedule annexed to the Act, or any of them, unless with the consent of the Governor of *Bombay* in Council first obtained, such consent to be signified by one of the Secretaries to the Government; and any writ or process sued forth or prosecuted against the person, goods or property of the said named persons, or any of them, without such consent as aforesaid, shall be utterly null and void." The second section, which is the one which has been brought more immediately under the attention of their Lordships on this occasion, says, "The Governor of *Bombay* in Council is empowered to act in the administration of the property, of whatever nature, left by the late *Nawab* of *Surat*, in regard to the settlement and payment of the debts and claims standing against the estate of the said late *Nawab* at the time of his death, and to make distribution of the remaining property among his family; and no act of the said Governor of *Bombay* in Council, in respect to the administration to and distribution of such property, from the date of the death of the said late *Nawab*, shall be liable to be questioned in any Court of Law or Equity."

The Governor of *Bombay* in execution of the power or duty, or both, thus conferred upon him, has exercised that power or duty in a manner unsatisfactory to members of the family of the *Nawab*, and, in consequence, the present Petitioners seek to have the

1854.

IN RE THE NAWAB OF SURAT.

case re-heard, or the distribution, thought right by the Governor of *Bombay* in Council, brought under the review of the Judicial Committee, as a matter of right, and in the exercise of its ordinary jurisdiction; and the question before their Lordships is, whether that is a course authorised by the Statutes under which they, as members of the Privy Council, exercising the particular functions of the Judicial Committee, are now sitting.

The question is not whether this may hereafter be a case which their Lordships may have to hear, if it shall so seem fit to Her Majesty, under the 4th section of the Statute, 3rd & 4th *Will.* IV., c. 41, to refer it to them. The question is entirely confined to the 3rd section of that Statute. Their Lordships desire that nothing which is said on the present occasion shall be understood as referring, directly or indirectly, to anything that may be thought right to be done under the 4th section. That is, in point of fact, a matter with which they have nothing to do. The 4th section provides, "That it shall be lawful for His Majesty to refer to the said Judicial Committee, for hearing or consideration, any such other matters whatsoever, as His Majesty shall think fit; and such Committee shall thereupon hear and consider the same." If, therefore, it shall hereafter be the pleasure of Her Majesty to refer the present petition, or any similar petition, to their Lordships, their Lordships will of course hear it, and report to Her Majesty upon it. At present no such case is before us. The only question is, whether, without a reference, and, as a matter of right, a petition complaining of what has been done by the Governor of *Bombay* in Council, under the particular power that I have mentioned,

shall be brought here in ordinary course; and that depends upon the question whether, within the true meaning of the 3rd section of the Statute, 3rd & 4th *Will.* IV., c. 41, establishing the Judicial Committee, the act, of which complaint is now made, is the act of a Judge or judicial officer; the language of the third section being, "that all appeals, or complaints in the nature of appeals whatever, which, either by virtue of this Act, or any law, Statute, or custom, may be brought before His Majesty or His Majesty in Council, from or in respect of the determination, sentence, rule, or order of any Court, Judge, or judicial officer, and all such appeals as are now pending," shall be heard in the way that is there mentioned.

Now, the 2nd section of the Indian Act of 1848 I have already read; and it will be requisite, in considering it more particularly, to look at the two portions of it separately. The first is, that "the Governor of *Bombay* in Council is empowered to act in the administration of the property, of whatever nature, left by the late *Nawab* of *Surat*, in regard of the settlement and payment of the debts and claims standing against the estate of the late *Nawab* at the time of his death, and to make distribution of the remaining property among his family." Now, whether, if the section had stopped there, the discretion of the Governor in Council was one which could have been regulated or interfered with judicially, or was absolute, their Lordships do not mean to intimate any opinion. Let it be assumed for a moment, that it was not absolute, but that it was a discretion bound to be exercised, according to some law, some custom, some state of rights. The mode of complaining of that must have been to the ordinary Courts of the

1854.

IN RE THE NAWAB OF SURAT.

country, either in one branch of the local jurisdiction or in another, from which it might have been brought, in regular course of appeal, before Her Majesty in Council. No such course has taken place, in the present instance, nor could it, for the obvious reason that I am about to mention. It is plain, therefore, that the Petitioners would not be right here, upon the supposition that the enactment that I am reading had ended at the point to which I have read. But the section proceeds, "And no act of the said Governor of *Bombay* in Council, in respect to the administration to and distribution of such property, from the date of the death of the said late *Nawab*, shall be liable to be questioned in any Court of Law or Equity." It is perfectly plain, therefore, that no local Court could have entered into the question of the propriety of the administration or distribution thought right by the Governor of *Bombay* in the exercise of this power. But the argument is, that though the ordinary Courts are excluded from interference, the Queen in Council is not; and, perhaps (though their Lordships do not mean to pronounce any opinion upon it), the argument may be well founded, that if the Governor in Council was here constituted a Court, it might have exceeded the limits of the Indian Legislature—the limits of their power, to exclude the judicial functions (if I may use the expression) of Her Majesty in Council. Their Lordships are of opinion, however, that the intention of this Act was not to create a Court; that the intention of the Act was to delegate, either arbitrarily, or subject to certain limitations of discretion, the administration and distribution of the *Nawab's* property, but in such a way that the administration and distribution should not be judicially ques-

tioned. The expression, it will be observed, is not "shall be liable to be questioned in any other Court of Law or Equity," but, "shall be liable to be questioned in any Court of Law or Equity." It may seem an anomalous and extraordinary proceeding to vest powers of this description, not liable to be checked by any ordinary course or powers of law, in any individual or in any body; but the Indian Legislature had power over the property; they might in the exercise of that power which is inherent in legislation, have given the whole property at once to any stranger, or devoted to any purpose, and whether with moral justice or not, is not the question. Instead of doing that, they do what to their Lordships appears substantially the same thing; they vest the power of dealing with it in a particular individual or a particular body, and declare that its acts shall not be liable to be questioned in any Court of Law or Equity.

Their Lordships, therefore, consider, that in the ordinary exercise of their functions, they are without jurisdiction to interfere. They are of opinion, that the proceeding of the Governor of *Bombay* in Council has not been an act of a Court, Judge, or judicial officer, within the meaning of the third section of the Statute, 3rd & 4th *Will.* IV., c. 41, but has been the act of a person or body not in any sense judicial; delegated and authorised to perform a particular function as to the responsibility for the exercise of which, or as to any appeal from that exercise, they were exempted by the Legislature which created them. In the extreme case which may be supposed, of corrupt or tyrannical abuse of such powers as these, which is not suggested, there must always be open to all the Queen's subjects those rights of complaint, in the last resort,

1854.

IN RE THE NAWAB OF SURAT.

either to Parliament, or to the Crown. The only question before us, is, whether, as I have said, the Governor of *Bombay* in Council has, in this instance, exercised a judicial function; and their Lordships are all clearly of opinion, that he did not exercise any such function, that he was not vested with any such function.

If their Lordships had entertained any doubt on this matter as to their jurisdiction, that doubt would probably have been removed by the language of the Statute, 7th & 8th *Vict.*, c. 69, for amending the 3rd & 4th *Will.* IV., c. 41. Not only the recital contained in that Act of Parliament, but some portion of the provisions contained in the enacting parts of it, appear to their Lordships very much to strengthen the view which they would have taken of this case, even had that Act not existed.

The Petitioners, therefore, will take such course as they may be advised, with reference to an application to the Crown, through the Board of Control or otherwise. By possibility, in consequence of such application, if made, the matter may come here again; and their Lordships will readily do their duty in hearing it. At present they consider it not to be within their ordinary functions to do so.

AN

INDEX

TO THE

PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

ACCOUNT.

See "MORTGAGE."
"SETTLED ACCOUNTS."

AGENT.

See "PRINCIPAL AND AGENT."

AGREEMENT.

Semble. There may be an agreement, that in consideration of an inquiry into the merits of a disputed claim, no advantage should be taken of the Statute of Limitations, in respect of the time employed in the inquiry, and an action may be brought for a breach of such agreement. [*The East India Company* v. *Oditchurn Paul*] - - - - - - - - - 43

See "MIRASI RIGHTS."

APPEAL.

1. Petition to dismiss an appeal from the *Sudder* Court in *India*, and for an Order directing that Court to carry into execution the terms of a deed of compromise, upon which the withdrawal of the appeal was founded, refused.

All this Court will do, in such circumstances, is to make an Order of dismissal, reserving to the parties leave to apply to the Court in *India*, to take further proceedings in pursuance of such agreement. [*Raja Sutti Churn Ghosal* v. *Sri Mudden Kishore Indoo*] - - 107

2. In a salvage cause, the Supreme Court, by its sentence pronounced in *March*, 1849, dismissed the claim of the salvors. In the month of *April* following, the Promovents moved for a rule *nisi* to show cause why the Defendants

should not pay their costs. This rule the Court refused. In *August*, in the same year, the Promovents applied for, and the Supreme Court granted, leave to appeal to *England* from the principal sentence of *March*, 1849. No objection was taken to the competency of the appeal in *Bombay* by the Respondents, nor was any protest against the right of appeal entered in *England*, but the Respondents at the hearing objected to the reception of the same, contending that the appeal was peremptied by the proceedings had in the month of *April*.

Held, that such objection was fatal; that the application for costs after the decision in the cause, had the effect of absolutely peremptting the appeal, so as to entirely take away from the Supreme Court the power of granting leave to appeal, as nothing could, after the proceedings in *April*, be done to restore the appeal from the principal sentence.

Costs of appeal, under the circumstances, refused. [*Loughnan* v. *Haji Joosub Bhulladina*] - 137

3. Pending an appeal to *England* the sole Appellant died, and the *Sudder* Court made an Order substituting one of the Respondents in his stead, as Appellant. *Semble:* It is not competent to the other Respondents to object to such Order at the hearing of the appeal, the proper course being to move the *Sudder* Court to discharge such Order. [*Baboo Kasi Persad Narain* v. *Mussumat Kawalbasi Kooer*] - - - - - 146

4. Leave given to appeal, under circumstances, though the time limited by the *Bombay* Charter had expired, and the Decree of the Court below sanctioning the sale of real estate, the subject of the suit, had been partially acted on; the Petitioner undertaking not to disturb the possession or title of the purchasers of any part of the property actually sold; to give security for costs, and to abide by any order which the Judicial Committee might think fit to make, touching the matters in dispute. [*In re Musadee Mahomed Cazum Sherazee*] - - - - - - - 196

5. Where this Court grants leave to appeal under the general jurisdiction of the Queen in Council, it will impose such terms upon the party applying, as the special circumstances of the case require.

Appeal admitted from an order confirming the report of Commissioners in a partition suit, although the appealable value was under Rs. 10,000, the amount prescribed by the Order in Council of the 10th of *April*, 1838. The Petitioner (the Plaintiff) had offered to compensate the Defendant, if the report of the Commissioners was varied. The Judicial Committee, in granting leave to appeal, put the Petitioner upon terms of lodging in the Council Office, within four months, a certificate of recognizance to the Queen in the sum of 1,500*l.* for

such compensation and costs as might be awarded. [*In re Sibnarain Ghose*] - - - - - 322

6. Leave to appeal on an *ex parte* application was, under special circumstances, granted upon terms of the Appellant prosecuting the Appeal and giving security for 500*l*. No step was, however, taken by the Appellant to perfect the security or prosecute the appeal. The Respondents, on being served with the Order admitting the appeal, filed a counter Petition to revoke the leave granted to appeal. The Judicial Committee, under the circumstances, there having been great delay, made an order putting the Appellant upon terms of lodging his Petition of appeal within six weeks, or the appeal to stand dismissed, and enlarged the amount of the recognizance to 1,000*l*. to cover the expenses occasioned by the proceedings in the Master's office, reserving the costs of the application to revoke the leave to appeal, to the hearing. [*McKellar* v. *Wallace*] - - - - - - 372

See "PRACTICE," 5.

ASSETS.

See "MORTGAGE," 2.

AUCTION PURCHASER (at Government sale).

See "MORTGAGE," 2.

BILLS OF EXCHANGE

Where Bills of Exchange are remitted for sale, and the proceeds directed to be applied to a specific purpose, the property in the bills remains in the remitter until the purpose for which they were remitted is satisfied. And, where the money realised by the sale was wrongfully applied by the agent, it was held by the Judicial Committee (affirming the judgment of the Court at *Calcutta*), that the remitter was entitled to recover the value of the bills in assumpsit, upon an indebitatus count, from the purchaser of them, who had notice of the purpose for which they were remitted, and the misapplication of the proceeds by the agent. [*Muttyloll Seal* v. *Dent*] 328

BOMBAY CHARTER.

The *Bombay* Charter (*December*, 1823,) establishes the Admiralty jurisdiction of the Supreme Court, "as the same is used and exercised in that part of *Great Britain* called *England*, together with all and singular their incidents, emergents and dependencies annexed and connexed causes whatsoever; and to proceed summarily therein, with all possible despatch, according to the course of our Admiralty in that part of *Great Britain* called *England*." Held, upon a construction of such Charter, that the rules and practice of the High

Court of Admiralty in *England*, prevail and govern the proceedings in the Supreme Court at *Bombay*, in maritime causes. [*Loughnan* v. *Haji Joosuh Bhulladina*] - 137

See "APPEAL," 4.
"LIMITATION OF SUIT," 2.

COMPROMISE.

See "PRACTICE," 2.
"SALE."

CONFLICT OF LAWS.

See "PRESCRIPTION."

CONSPIRACY.

See "WAGER CONTRACT."

CONSTRUCTION.

1. The Statute of Limitations, 21 *Jac.* I., c. 16, extends to *India*.

The Statute, 9 *Geo.* IV., c. 14 (extended to *India* by the Indian Act, No. 14 of 1840), held to apply to an action pending in the Supreme Court at the time of its introduction into *India*. [*The East India Company* v. *Oditchurn Paul*] - 43

2. After an action was entered in the Supreme Court at *Calcutta* upon a wager contract, wager contracts were declared invalid by the Act of the Indian Legislature, No. 21 of 1848. Held, not to affect existing contracts, or actions already commenced upon such contracts, there being no words in the Act to shew the intention of the Legislature to affect existing rights. [*Doolubdass Pettamberdass* v. *Ramloll Thackoorseydass*] - - - 109

3. The English Statute of Limitations, 21 *Jac.* I., c. 16, extends to *India*, and applies to Hindoos and Mahomedans as well as Europeans, in civil actions in the Supreme Court. Where words have been long used in a technical sense, and have been judicially construed to have a certain meaning, and have been adopted by the Legislature as having a certain meaning prior to a particular Statute, in which they are used, the rule of construction of Statutes requires, that the words used in such Statute should be construed according to the sense in which they have been so previously used, although that sense may vary from the strict literal meaning of the words.

The words in the Statute of Limitations, 21 *Jac.* I., c. 16, s. 7, "beyond the seas," are synonymous, in legal import, with the words "out of the realm," or "out of the land," or "out of the territories," and are not to be construed literally. [*Her Highness Ruckmaboye* v. *Lulloobhoy Mottichund*] - - - - 284

See "LIMITATION OF SUIT," 2.
"REGULATIONS."

CONTRACT

(Breach of).

In assumpsit, the breach of a contract is the cause of action, and the Statute of Limitations runs from the time of the refusal to

perform the contract. [*The East India Company* v. *Oditchurn Paul*] 43

COSTS.

A Defendant did not appeal from an interlocutory decree, but proceeded in the Master's office in respect of the matters included in the accounts; but before the general report was made by the Master, he appealed from such interlocutory decree to *England*. In reversing such Decree, the Judicial Committee ordered him to pay the costs of the proceedings in the Master's office, and remitted the cause to the Court below, with directions, that the costs payable to the Defendant upon the dismissal of the bill, and the costs payable by him consequent upon his proceedings in the Master's office, should be set off, the one against the other, and the balance paid to the party entitled to the same. [*McKellar* v. *Wallace*] - - - - - - - - 372

See "APPEAL," 2, 5.

COURT.

1. Constitution of the Supreme Court at *Calcutta*. [*The Bank of Bengal* v. *Macleod*] - - - - - - 1
[*The East India Company* v. *Oditchurn Paul*] - - - - - - 43
2. The practice of the High Court of Admiralty in *England* regulates proceedings in Supreme Court at *Bombay* in maritime causes. [*Loughnan* v. *Haji Joosub Bhulladina*] 137

See "VERDICT."

DEBTOR AND CREDITOR.

See "SETTLED ACCOUNTS."

DECISIONS.

(Overruled, observed upon, &c.)

The rule laid down in the cases of *Gill* v. *Cubitt* (3 B. & C. 466), and *Down* v. *Halling* (4 B. & C. 330), that the negligence of a party taking a negotiable instrument fixes him with the defective title of the party passing it, observed upon, and those cases declared to be no longer law. [*The Bank of Bengal* v. *Macleod*] - - - - - 1

Moore v. *Durden* (2 Exch. Rep. 22) approved *of*.

The case *Levi* v. *Levi* (6 Car & Pay. 239) observed upon and questioned. [*Doolubdass Pettamberdass* v. *Ramloll Thackoorseydass*] - - - 109

DECREE.

1. Peremptory Order of Judicial Committee to *Sudder* Court to carry Order in Council into effect. [*In re Rajah Vassareddy Lutchmeputty Naidoo*] - - - - - - - - 300
2. Proceedings under, in the Master's Office, which was subsequently reversed. [*McKellar* v. *Wallace*] 372
3. Stay of execution of Decree of Court below, refused. [*In re Rajah Bommaranjee Bahadoor*] - - 298

DEFEAZANCE

See "MORTGAGE," 1.

ENGROSSING.

See "REGRATING."

EQUITABLE MORTGAGE.

See "MORTGAGE," 2.

EVIDENCE.

1. At a trial, certain documents contained in the schedule to the answer of the Defendants to a Bill of Discovery filed in Equity, were read as evidence for the Plaintiff, but the Court refused to allow the Defendants to read the answer to which the schedule was annexed. Held, that as the Supreme Court, at *Calcutta*, being Jurymen as well as Judges, had refused to allow the answer to be read, on the ground that such answer contained nothing material to the issue which could influence their verdict, a new trial on the ground of such refusal would not be granted. [*The East India Company* v. *Oditchurn Paul*] - - - - - - - - 43
2. Action by Bankers, against the representative of a deceased customer, to recover a balance of an account alleged to be due to the Bankers by the deceased at the time of his death, dismissed by the *Sudder* Court, no satisfactory proof having been given that such balance was due. Such finding sustained on appeal by the Judicial Committee.

The production of Bankers' books, with the entries of the items constituting the demand, kept according to the established custom of *Mahajuns* in *India*, is not of itself sufficient evidence to establish such a claim; strict proof of the debt being required. [*Rai Sri Kishen* v. *Rai Huri Kishen*] - - - 432

EXECUTION.

1. Application to stay execution of Decree of *Sudder* Court, refused. [*In re Rajah Bommaranjee Bahadoor*] - - - - - - - - 298
2. Peremptory Order of Judicial Committee for *Sudder* Court to carry into execution Order in Council made on Decree of Judicial Committee. [*In re Rajah Vassareddy Lutchmeputty Naidoo*] - - 300

FAMILY CUSTOM.

See "PACHEET."
"ZEMINDARY."

FOREIGN LAW.

The law of prescription, or limitation, is a law relating to procedure, having reference only to the *lex fori*.

Where a Court entertains a cause of action which originated in a foreign country, the rule is to adjudicate according to the law of that country, yet the Court proceeds according to the prescription of the country in which it exercises jurisdiction. [*Her Highness Ruckmaboye* v. *Lulloobhoy Mottichund*] - 234

FOUJDARRY COURT.

Effect of Order of giving possession of real estate. [*Baboo Kasi Per-*

sad Narain v. *Mussumat Kawalbasi Kooer*] - - - - - 146
[*Kadir Bukhsh Khan* v. *Mussumatain Fusseeh-oon-Nissa*] - - - - 413

GIFT.

1. A claim to real and personal estate under a *tumleeknamah* (deed of gift), against a party to whom possession had been given by the *Foujdarry* Court, rejected under the circumstances, the deed not being sufficiently proved. [*Kaboo Kasi Persad Narain* v. *Mussumat Kawalbasi Kooer*] - - - - 146
2. A claim to a moiety of *mafee* and other *zemindary* property under alleged deeds of gift and relinquishment by a deceased Mahomedan widow and her daughter (a married woman), and two unmarried grand-daughters, in favour of her husband, dismissed: the Judicial Committee (affirming the judgment of the Courts in *India*) holding, that the deeds were forgeries, and decreeing, as in a case of intestacy, that the grand-daughters were entitled by the Mahomedan law, as coparceners, to three-fourths of the estates in question, and the father to the remaining fourth. [*Kadir Bukhsh Khan* v. *Mussumatain Fusseeh-oon-Nissa*] 413

HINDOO CONTRACT.

See "LIMITATION OF SUIT," 2.

HINDOO LAW.

See "GIFT," 1.
"ZEMINDARY."

IMPLIED WARRANTY

(Of seaworthiness).

See "SHIP AND SHIPPING."

INDIA.

The Statute of Limitations, 21 *Jac.* I., c. 16, extends to *India*.
The Statute, 9 *Geo.* IV., c. 14, extended to *India* by the Indian Act, No. 14 of 1840. [*The East India Company* v. *Oditchurn Paul*] - 43
The English Statute of Limitations, 21 *Jac.* I., c. 16, extends to *India*, and applies to Hindoos and Mahomedans, as well as Europeans, in civil actions in the Supreme Court. [*Her Highness Ruckmaboye* v. *Lulloobhoy Mottichund*] - - - 234

INHABITANT.

Constructive inhabitancy by carrying on business within the jurisdiction of the Supreme Court of *Bombay*. [*Her Highness Ruckmaboye* v. *Lulloobhoy Mottichund*] - - - 234

See "LIMITATION OF SUIT."

INHERITANCE,

By Hindoo law.

See "GIFT," 1.

By Mahomedan law.

See "GIFT," 2.

INSURANCE.

See "SHIP AND SHIPPING."

LEAVE TO APPEAL.

See "APPEAL," *passim*.

LIEN.

By Decree holder against proceeds of defaulters' estate sold by Government. [*Douglas* v. *The Collector of Benares*] - - - - - - - - 271

See "MORTGAGE."

LIMITATION OF SUIT.

1. In assumpsit, the breach of a contract is the cause of action, and the Statute of Limitations runs from the time of the breach, and not from the time of the refusal to perform the contract.

In 1822, A. purchased at a Government sale, at *Calcutta*, a quantity of salt, part of a larger portion then lying in the warehouse of the vendors (the Government), where the salt was to be delivered. By the conditions of sale, it was declared, that on payment of the purchase-money, the purchaser should be furnished with permits to enable him to take possession of the salt; there was also a stipulation that the salt purchased should be cleared from the place of delivery within twelve months from the day of sale, otherwise the purchaser was to pay warehouse rent for the quantity then afterwards to be delivered. The purchaser paid the purchase-money, and received permits for the delivery of the salt, which was delivered to him in various quantities, down to the year 1831; in which year an inundation took place, which destroyed the salt in the warehouse, and there remained no salt to satisfy the contract. The purchaser petitioned the vendors for a return of the purchase-money, which was refused, on the ground that the loss happened through his negligence in not sooner clearing the salt from the warehouse. An inquiry, however, took place at the instance of the Government, who referred the matter to the Salt Collector for a report. This inquiry was made by the Government without the purchaser being a party to it. The Collector did not make his report till the year 1838, and upon that report the Government refused to return the purchase-money claimed in respect of the deficient salt. The purchaser then brought an action of assumpsit for recovery of the purchase-money of such part of the salt as had not been delivered, alleging, as a breach, the non-delivery thereof. To this the Defendants pleaded the Statute of Limitations, that the cause of action had accrued within six years before the commencement of the suit. The Supreme Court at *Calcutta* found a verdict for the Plaintiff. Held, upon appeal, reversing such verdict, that when the purchaser applied for the residue of the salt, and was told that there was none to deliver, the contract was broken, and the cause of action accrued from the time of such breach; and that the subsequent inquiries by the Government did not suspend the operation of the Statute of Limitations till the year 1838, the

time of the final refusal, and that the remedy was barred by the Statute.

Semble.—There may be an agreement, that in consideration of an inquiry into the merits of a disputed claim, no advantage should be taken of the Statute of Limitations, in respect of the time employed in the inquiry, and an action might be brought for a breach of such agreement. [*The East India Company* v. *Oditchurn Paul*] 43

2. Trover for 200 chests of opium, both parties were Hindoos. The Defendant pleaded in bar, the English Statute of Limitations, 21 *Jac.* I., c. 16, in the ordinary form. Replication, that the Plaintiff resided during the period of prescription at *Malwa*, in *India*, without the territories of the Government of the East India Company, and without the jurisdiction of the Supreme Court of *Bombay*. Rejoinder, that the Defendant, though not personally resident at *Bombay*, carried on business there by a *Mooneem* or *Gomastah*, an inhabitant of *Bombay*, and subject to the jurisdiction of the Supreme Court, and that the goods were the property of Defendant. General demurrer to rejoinder. The Supreme Court at *Bombay* held, first, that as the Statutes of Limitation, 21 *Jac.* I., c. 16, and 4 *Anne*, c. 16, applied to *Bombay* and to Hindoos, the fact of the Plaintiff being resident at *Malwa* was not "beyond the seas," so as to bring the Plaintiff within the 7th section of the 21 *Jac.* I., c. 16; and, secondly, that the carrying on business at *Bombay* amounted to a constructive inhabitancy at *Bombay*, so as to exclude her from the benefit of the exception in the Statute. Upon appeal, held by the Judicial Committee, reversing the judgment of the Supreme Court,—

First. That the saving words of the Statute, 21 *Jac.* I., c. 16, s. 7, "beyond the seas," were not to be construed literally, those words being in legal import and effect synonymous with the words "without the territories," and that the replication disclosed a valid answer to the Defendant's plea, and as the words of the replication, "without the territories," were equivalent to the words "beyond the seas," the Plaintiff was within the express provision of the seventh section, and that the plea, setting up the Statute, was no bar.

Second. That the rejoinder, that the Plaintiff might sue or be sued during the time by reason of a constructive inhabitancy, was no answer in law to the replication; for although it might give the Court jurisdiction, yet it did not prevent the express operation of the 7th section of the 21 *Jac.* I., c. 16.

The Charter of the 8th of *December*, 1823, which created the Supreme Court at *Bombay*, provides by section 29, that, "in cases of Mahomedans or Gentoos, their inheritance, and succession to lands, rents,

and goods, and all matters of contract and dealing between party and party, shall be determined, in cases of Mahomedans, by the laws and usages of the Mahomedans, and where the parties are Gentoos, by the laws and usages of the Gentoos, or by such laws and usages as the same would have been determined, if the suit had been brought in a Native Court;" and the 37th section directs, that "the Court shall frame such process, and make such rules and orders for the execution of the same, in all suits, civil and criminal, to be commenced, sued, or prosecuted, within their jurisdiction, as shall be necessary for the due execution of all or any of the powers thereby committed thereto, with an especial attention to the religion, manners, and usages of the native inhabitants living within its jurisdiction, and accommodating the same to their religion, manners, and usages, and to the circumstances of the country, so far as the same can consist with the due execution of law and the attainment of substantial justice."

Held, upon a construction of these sections, that, as the law of limitation is a matter of procedure, and the Supreme Court at *Bombay* had power to frame its procedure different from the Native Courts, the Court was right in allowing the plea of the English Statute of Limitations, in an action between Hindoos upon a Hindoo contract, as the judgment of the Court on such plea was no determination relating to any right arising out of any contract or dealing involved in the cause of action. [*Her Highness Ruckmaboye* v. *Lulloobhoy Motichund*] - - - - - - - - 234

MAHAJUNS

(Custom of).

See "EVIDENCE," 2.

MAHOMEDAN LAW.

See "GIFT," 2.
"WILL."

MARINE INSURANCE.

See "SHIP AND SHIPPING."

MIRASI RIGHTS.

Bill by a party claiming to represent the interests of certain proprietors of land termed "*Mirasidars*" against the East India Company, for specific performance of an agreement alleged to have been entered into by them to grant compensation for the *mirasi* rights in certain lands taken possession of adversely by the *Madras* Government for public purposes. Upon appeal, such Bill dismissed, the Judicial Committee holding, that there was no evidence of any contract by the East India Company, to sustain a Bill in a Court of Equity for the relief sought. [*The East India Company* v. *Nuthumbadoo Veerasawmy Moodelly*] 317

MOCURRERY.

Semble.—The word "Mocurrery," in a *sunud*, does not necessarily import "perpetuity." [*The Government of Bengal* v. *Nawab Jafur Hossein Khan*] - - - - 467

MORTGAGE.

1. Conveyance by Lease and Release in fee, in the circumstances, held to be subject to a parol defeazance, and to be in the nature of a mortgage, with a power of re-purchase on the footing of redemption; and a re-conveyance decreed. [*Muttyloll Seal* v. *Annundochunder Sandle*] 72

2. A. purchased certain villages in the name of his son, B. A. being indebted to C. executed a mortgage bond, and deposited the title-deeds of these villages with C. as security for the debt. C. afterwards sued A. for recovery of the mortgage debt, and ultimately obtained a Decree in his favour. Pending this suit A. died, and was succeeded by B., his heir, against whom the suit was revived. B. became a defaulter to Government, when the Government authorities seized the villages, and took steps for bringing them to sale to satisfy the Government demands. C. informed the Government officer of his claim, and petitioned to have the sale stayed, but the Collector sold the villages as the property of B., suppressing the notice of the equitable charge of C. upon the villages. C. then sued B., the Collector, and the auction purchasers, claiming to be entitled to the sale proceeds of the villages in the hands of the Government, in satisfaction of his mortgage debt. The *Sudder Dewanny* Court dismissed the claim of the Plaintiff on the ground, that the Decree made in the suit against A. was against the effects of A., and only applied to such property as B. was in possession of at that time; that as it had been sold to realise the demands of Government, the Decree did not apply to the villages.

Such judgment, on appeal, reversed, the Judicial Committee holding:—

First. That the suit was properly instituted for recovery of the sale proceeds in possession of Government, as the Decree obtained by C. against B. operated as a conversion of the estate of A., making it assets in B.'s hands, which C. had a right to follow.

Secondly. That, as the Government had notice of C.'s equitable charge upon the villages, and suppressed that fact at the auction sale to the purchasers, there was a clear equity in C. to call upon the Government for payment out of the auction proceeds received by them, and an account directed of the amount received by the Collector from the sale of the villages, with interest, so far as the amount received would extend to the payment of his mortgage debt. [*Douglas* v. *The Collector of Berares*] - - - 271

NEGOTIABLE INSTRUMENT.

The rule laid down in the cases of *Gill* v. *Cubit* (3 B. & C. 466) and *Down* v. *Halling* (4 B. & C. 330), that the negligence of a party taking a negotiable instrument fixes him with the defective title of the party passing it, observed upon, and those cases declared to be no longer law. [*The Bank of Bengal* v. *Macleod*] - - - 1

See "PRINCIPAL AND AGENT."

NEW TRIAL.

See "VERDICT."

NUMUK SAYER MEHALS

(Resumption of, by Government).

See "RESUMPTION."

NUNCUPATIVE WILL.

See "WILL."

PACHEET.

A grant by a former *Raja* of *Pacheet*, of a *pergunna*, part of the *Zemindary*, or *Raj of Pacheet*, to a member of his family, held to be a grant for maintenance only, and resumption decreed to the *Raja* in possession.

Semble.—Grants made by the predecessor of the *Raja* in possession, whether in fee or for maintenance, enure only during the lifetime of the grantor, and are not binding on his successor.

Whether the *Zemindary* of *Pacheet* constitutes an indivisible estate of inheritance, and as such inalienable, *Quære?* [*Anund Lal Sing Deo* v. *Maharaja Dheraj Gurrood Narayun Deo*] - - - - - 82

PARTITION.

See "ZEMINDARY."

PEREMPTION OF APPEAL.

See "APPEAL" 2.

PEREMPTORY ORDER.

1. By Judicial Committee to Registrar of Inferior Court to transmit evidence. [*Baboo Kasi Persad Narain* v. *Mussumat Kawalbasi Kooer*] 146
2. To *Sudder Dewanny* Court to carry Order in Council made upon Decree of the Judicial Committee into execution. [*In Re Vassareddy Lutchmeputty Naidoo*] - - - - 300

PLEADING.

Semble.—The mere allegation in a plaint, that the parties are Hindoos is a sufficient averment of the fact to raise an objection to the cause being decided by the English law of limitations. [*Her Highness Ruckmaboye* v. *Lulloobhoy Mottichund*] 234

See "BILL OF EXCHANGE."
"REGULATIONS."

POSSESSION.

The effect of an order of the *Foujdarry* Court, giving possession of real estate, is merely to prevent the occupation being disturbed by violence, and confers no right or

title on the party put in possession. [*Kadir Bukhsh Khan* v. *Mussumatain Fusseeh-oon-Nissa*] 413

See "GIFT," 1.

POWER OF ATTORNEY.

Power to "sell, indorse, and assign."

See "PRINCIPAL AND AGENT."

PRACTICE

1. This Court will not entertain a purely technical objection to a party's right of action, which has not been made in the Court below. [*The Bank of Bengal* v. *Macleod*] 1

2. Petition to dismiss an appeal from the *Sudder* Court in *India*, and for an Order directing that Court to carry into execution the terms of a deed of compromise, upon which the withdrawal of the appeal was founded, refused.

All this Court will do, in such circumstances, is to make an order of dismissal, reserving to the parties leave to apply to the Court in *India*, to take further proceedings in pursuance of such agreement. [*Raja Sutti Churn Ghosal* v. *Sri Mudden Kishore Indoo*] - - 107

3. Pending the appeal to *England*, the sole Appellant died, and the *Sudder* Court made an order substituting one of the Respondents in his stead as Appellant. *Semble*: It is not competent to the other Respondents to object to such order at the hearing of the appeal, the proper course being to move the *Sudder* Court to discharge such order.

In a case of great delay by the officers of the *Sudder Dewanny Adawlut*, at *Calcutta*, in not forwarding certain depositions filed in the cause, which had been omitted in the transcript forwarded to *England*, the Judicial Committee peremptorily ordered the *Sudder Dewanny* Court forthwith to transmit the omitted evidence to *England*. [*Baboo Kasi Persad Narain* v. *Mussumat Kawalbasi Kooer*] 146

4. Leave given to appeal, under circumstances, though the time limited by the *Bombay* Charter had expired, and the Decree of the Court below sanctioning the sale of real estate, the subject of the suit, had been partially acted on; the Petitioner undertaking not to disturb the possession or title of the purchasers of any part of the property actually sold; to give security for costs, and to abide by any order which the Judicial Committee might think fit to make, touching the matters in dispute. [*In re Musadee Mahomed Cazum Sherazee*] - - - - - - 196

5. Motion to rescind order of the *Sudder* Court at *Madras*, for the execution of a decree pending an appeal, and to stay execution, refused, on the ground of the length of time that had elapsed from the making of the order, and the probability of its having been acted on in *India*. [*In re Rajah Bommaranjee Bahadoor*] - - - - 298

6. In suits before the *Sudder De-*

wanny Adawlut, at *Madras*, that Court decided in favour of A.; and pending appeals to *England*, by B. and others, put A. into possession of the disputed estates, which were of great value, without taking from him the security required by *Madras* Reg. VIII. of 1818, sec. 4. The Judicial Committee of the Privy Council reversed the Decree of the *Sudder Dewanny Adawlut*, and directed that Court to put B. into possession of the estates. Pending the appeals the Board of Revenue took possession, sold a portion of the estates for satisfaction of arrears of revenue, and became themselves purchasers. The *Sudder Dewanny* Court declined to interfere or carry into execution the Order in Council confirming the report of the Judicial Committee, on the ground that the estates were then in the possession of the *Madras* Government. Upon a petition by B. to the Judicial Committee complaining of such refusal, a peremptory order was issued, commanding the *Sudder Dewanny Adawlut* forthwith to carry into execution the Order in Council made on the appeals, and to direct the Collectors of the districts in which the estates were situate to put B. into possession, according to the terms of the Order in Council.

The application being *ex parte* was postponed for notice to be given to the East India Company and the Board of Control, of the petition and proceedings. [*In re Rajah Vassareddy Lutchmeputty Naidoo*] 300

7. When this Court grants leave to appeal under the general jurisdiction of the Queen in Council, it will impose such terms upon the party applying, as the special circumstances of the case require.

Appeal admitted from an order confirming the report of Commissioners in a partition suit, although the appealable value was under Rs. 10,000, the amount prescribed by the Order in Council, of the 10th of *April*, 1838. The Petitioner (the Plaintiff) had offered to compensate the Defendant, if the report of the Commissioners was varied. The Judicial Committee, in granting leave to appeal, put the Petitioner upon terms of lodging in the Council Office, within four months, a certificate of recognizance to the Queen in the sum of 1,500*l.* for such compensation and costs as might be awarded. [*In re Silnarain Ghose*] - - - - - - 322

8. Leave to appeal on an *ex parte* application was, under special circumstances, granted upon terms of the Appellant prosecuting the appeal, and giving security for 500*l.* No step was, however, taken by the Appellant to perfect the security, or prosecute the appeal. The Respondents, on being served with the order admitting the appeal, filed a counter petition to revoke the leave granted to appeal. The Judicial Committee, under the circumstances, there

having been great delay, made an order, putting the Appellant upon terms of lodging his petition of appeal within six weeks, or the appeal to stand dismissed, and enlarged the amount of the recognizance to 1,000*l.* to cover the expenses occasioned by the proceedings in the Master's Office, reserving the costs of the application to revoke the leave to appeal, to the hearing. [*McKellar* v. *Wallace*] 372

9. The Respondent, not having appeared, the appeal was, after two years, set down for hearing, *ex parte*. Before the hearing, the Respondent appeared, and moved, under special circumstances, to postpone the hearing for six months, to enable him to lodge his case. The Judicial Committee put him upon terms of having the appeal heard at the next sittings; restraining him from doing anything in the interval to the prejudice of the fund in the Court below, and with payment of the costs of the application. [*Watson* v. *Sreemunt Lal Khan*] - - 447

10. An Act of the Legislature of *India*, No. 18 of 1848, empowered the Governor in Council of *Bombay* to administer the private estate of the late *Nawab* of *Surat;* and by section 2 it was enacted, "that no act of the said Governor of *Bombay* in Council in respect of the administration to, and distribution of, such property, from the date of the death of the said *Nawab*, should be liable to be questioned in any Court of Law or Equity." No provision was made for an appeal from the Governor's decision In pursuance of the power conferred by this Act, the Government agent at *Surat*, to whom the matter was referred, made an award distributing the estate in certain shares, among the heirs of the deceased, which award was confirmed by the Governor in Council.

Upon an application by a claimant dissatisfied with the award, to the Judicial Committee for leave to appeal from the Governor in Council's confirmation of the award: Held, that the award was not such a judicial act as to come within the meaning of sec. 3 of the Statute, 3rd & 4th *Will.* IV., c. 41, or the 7th & 8th *Vict.*, c. 69, and could not be entertained by the Judicial Committee, without a special reference to them by the Crown, under section 4 of the Statute, 3rd & 4th *Will.* IV., c. 41. [*In re The Nawab of Surat*] - - - - 499

PRESCRIPTION.

The law of prescription, or limitation, is a law relating to procedure, having reference only to the *lex fori*.

Where a Court entertains a cause of action which originated in a foreign country, the rule is to adjudicate according to the law of that country, yet the Court proceeds according to the prescription of the country in which it exercises juris-

diction. [*Her Highness Ruckmaboye* v. *Lulloobhoy Mottichund*] 234

PRINCIPAL AND AGENT.

The payee of promissory notes of the East India Company, by a power of attorney, authorised his agents at *Calcutta* to "sell, endorse, and assign" the notes. These notes were transferable by endorsement payable to bearer. The agents, in their character of private bankers, borrowed money of the Bank of *Bengal*, offering as security these promissory notes. The Bank made the advance, and the agents endorsed the notes, such endorsement purporting to be as attorney for their principal, and deposited them with the Bank, by way of collateral security for their personal liability, at the same time authorising the Bank, in default of payment, to sell the notes in reimbursement of the advances. The agents afterwards became insolvent, and default having been made in payment, the Bank sold the notes, and realised the amount of their loan.

Held, that the endorsement of the notes by the agents of the payee to the Bank was within the scope of the authority given to them by the power of attorney, and that the payee could not recover in detinue against the Bank. [*The Bank of Bengal* v. *Macleod*] - - - - 1

See "BILLS OF EXCHANGE."

RAJ.

See "PAGHEET."
"ZEMINDARY."

REGRATING.

The common law offence of engrossing, or regrating, applies only with respect to the necessaries of life [*Doolubdass Pettamberdass* v. *Ramloll Thackoorseydass*] - - - 109

REGULATIONS.

1. The permission under sec. 5 of *Ben.* Reg. IV. of 1793, to a Defendant to file a supplemental answer, does not entitle him to make a new case, or raise a fresh issue, in contradiction of his former defence.

By sec. 10 of *Ben.* Reg. XXVI. of 1814, the *Sudder Amin* is bound to record a proceeding specifying the points at issue, and to call for evidence for and against the claim. [*Douglas* v. *The Collector of Bengal*] 271

2. By *Ben.* Reg. XI. of 1822, sec. 30, all underleases are extinguished by a Government sale of the proprietor's lands for arrears of revenue, and an auction purchaser takes the lands clear of all undertenures. [*Watson* v. *Sreemunt Lal Khan*] - - - - - - - - 447

3. *Quære.*—Whether the *Numuk sayer mehals*, being a *sayer* right, was not wholly abolished by *Ben.* Reg. XXVII. of 1793, and the *Bengal* Government, in their Sovereign character, have not a right

to resume. [*The Government of Bengal* v. *Nawab Jafur Hossein Khan*] - - - - - - - - 467

RES JUDICATA.

A general demurrer, on the ground of the subject-matter of the suit being *res judicata*, allowed to a suit brought in the Supreme Court of *Bombay*, by a party claiming certain property, which appeared by the statements in the Bill to have been the subject of a previous suit in the same Court, in which the Plaintiff had intervened by petition, and obtained some order, the nature or effect of which was not stated, and did not appear upon the Record then before the Court. [*Musadee Mahomed Cazum Sherazee* v. *Meerza Ally Mahomed Shoostry*] - - - - - - - - 187

RESUMPTION.

Resumption by Government of *Numuk sayer mehals* (saltpetre duty estates) upheld: the *sunuds* of the *Soobadar* of *Bahar*, the ruling power previous to the Company's accession to the *Dewanny*, purporting to grant this Government revenue as *mocurrery istimrary*, at a permanent fixed rent, being declared forgeries.

Quære.—Whether the *Numuk sayer mehals*, being a *sayer* right, was not wholly abolished by *Ben.* Reg. XXVII. of 1793, and the *Bengal* Government, in their Sovereign character, had not an absolute right to resume. [*The Government of Bengal* v. *Nawab Jafur Hossein Khan*] - - - - - - - - 467

See "PACHEET."

REVENUE.

See "RESUMPTION."
"SALE."

REVIVOR.

See "APPEAL," 3.

SALE.

1. *Semble.*—Where property is sold by Government for general debts, and not for arrears of revenue, they sell only the interest of the debtor, and do not guarantee the vendee a title. [*Douglas* v. *The Collector of Benares*] - - - 271
2. The right to impeach a sale of lands for arrears of Government revenue extends not only to the defaulting proprietor, but to derivative holders under him.

By *Ben.* Reg. XI. of 1822, sec. 30, all underleases are extinguished by a Government sale of the proprietor's lands for arrears of revenue, and an auction purchaser takes the lands clear of all under-tenures.

At a sale by Government for arrears of revenue, the Government became purchasers, and afterwards granted a lease of the lands for a term of years, and put their lessees into possession. At the time of the sale the lands were subject to an *istimrary* lease. No suit was instituted to reverse the sale, but the Government, some time after-

wards, in consequence of doubts as to the legality of the sale, offered to give up their rights under the sale, and to restore the lands to the original proprietors, subject to the recognition of the claims of their lessees. This offer resulted in an arrangement between the Government, the original proprietors, and the Government lessees, and eventually the original proprietors upheld the lease to the Government lessees to a part of the lands called the *Jungle Mehal*, for a term of years at a reduced rent. In a suit by the *istimrary* lessee for possession: Held (reversing the decree of the *Sudder* Court), that by *Ben.* Reg. XI. of 1822, sec. 30, the *istimrary* lease was determined by the sale for Government arrears, and, that the arrangement by which the lands were restored to the proprietors, subject to the rights of the Government lessees, was in the nature of a compromise, and not such an unconditional restoration as amounted to a reversal of the sale, and the consequent revival of the *istimrary* lease.

Aliter. If a suit had been brought, and a Decree of the Court made for the reversal of the sale. [*Watson* v. *Sreemunt Lal Khan*] - - - 447

See "BILL OF EXCHANGE."
"MORTGAGE."

SAYER.

The settlement by the Government with a proprietor of the soil, under the Decennial settlement, made, perpetual by *Ben.* Reg. VIII. of 1793, relates to land revenue only, and not to *sayer* duties claimed by a party not a land proprietor. [*The Government of Bengal* v. *Nawab Jafur Hossein Khan*] - - - 467

SETTLED ACCOUNTS.

Principles which regulate a Court of Equity in opening stated and settled accounts.

Accounts of long standing and great complication of a mercantile firm at *Calcutta*, one of the partners of whom afterwards acted as agent in *England*, involving charges for agency and partnership transactions, were mutually agreed to be investigated and closed. After long negotiations and discussion respecting some of the charges, an agreement was come to, the parties agreeing to strike the general balance at a given sum, reserving one item of the account, amounting to a considerable sum, for future investigation. This reserved item was subsequently settled by the acceptance of a Bill of exchange for a lesser amount, as such reserved item, if opened, would have disarranged the settled general account. The Bill of exchange was dishonoured, and an action brought to recover the amount. A bill was then filed for an injunction, for the cancelment of the Bill of exchange, and that the accounts so settled might be opened. The Supreme Court at

Calcutta held, that the reserved item being left open, was evidence that the account was not finally closed, and decreed the accounts to be opened, referring the cause to the Master.

Upon appeal, held by the Judicial Committee (reversing such decree and dismissing the bill, with costs), that the transaction amounted to an adjustment of the general accounts between the parties, subject to the reserved item which was ultimately settled, and that the accounts so settled and closed could not, in the absence of fraud, be re-opened. [*McKellar* v. *Wallace*] - - - - - - - - 372

SHIAS SECT.

See "WILL."

SHIP AND SHIPPING

The warranty of seaworthiness in a time policy, at the commencement of the risk, is not a continuing obligation cast upon the assured while the risk is running. So held by the Judicial Committee, affirming the judgment of the Supreme Court at *Calcutta*, in an action brought for a total loss, by stranding, within the time of the running of the policy, after leaving an intermediate port, the defence being, that at the time of the loss the vessel was unseaworthy by reason of an insufficient crew, she having sailed from the intermediate port without sufficient hands to work the vessel, although she had a sufficient crew at the time she started for the voyage.

Semble.—There is no implied warranty of seaworthiness in a time policy. [*Jenkins* v. *Heycock*] 361

SPECIFIC PERFORMANCE.

See "MIRASI RIGHTS."

STATUTES

(Prospective and retrospective operation of).

1. The Statute, 9 *Geo.* IV., c. 14 (extended to *India* by the Indian Act, No. 14 of 1848), held to apply to an action pending in the Supreme Court, at the time of its introduction into *India*. [*The East India Company* v. *Oditchurn Paul*] - 43
2. After an action was entered in the Supreme Court at *Calcutta*, upon a wager contract, wager contracts were declared invalid by the Act of the Indian Legislature, No. 21 of 1848. Held not to affect existing contracts, or actions already commenced upon such contracts, there being no words in the Act to show the intention of the Legislature to affect existing rights.

Statutes are, *primâ facie*, deemed to be prospective only. "*Nova constitutio futuris formam imponere debet non præteritis.*" [*Doolubdass Pettamberdass* v. *Ramloll Thackoorseydass*] - - - - - - 100

3. The English Statute of Limitations, 21 *Jac.* I., c. 16, extends to *India*, and applies to Hindoos and

Mahomedans as well as Europeans, in civil actions in the Supreme Court. [*Her Highness Ruckmaboye* v. *Lulloobhoy Mottichund*] 284

SUCCESSION.

See "PACHEET."
"ZEMINDARY."

TUMLEEKNAMAH.

See "GIFT," 1.

USAGE.

See "PACHEET."
"ZEMINDARY."

VERDICT.

1. Upon the reversal of the judgment of the Supreme Court at *Calcutta*, finding for the Plaintiff, this Court, in the circumstances of the constitution of the Supreme Court, directed a verdict to be entered for the Defendants, instead of awarding a *venire de novo*. [*The Bank of Bengal* v. *Macleod*] - 1
2. At a trial, certain documents contained in the schedule to the answer of the Defendants to a Bill of Discovery, filed in Equity, were read as evidence for the Plaintiff, but the Court refused to allow the Defendants to read the answer to which the schedule was annexed. Held, that as the Supreme Court at *Calcutta*, being jurymen as well as Judges, had refused to allow the answer to be read, on the ground that such answer contained nothing material to the issue, which could influence their verdict, a new trial on the ground of such refusal would not be granted. [*The East India Company* v. *Oditchurn Paul*] - - - - - - 43

WAGER CONTRACT.

Wager contracts between the Plaintiffs and Defendants upon the price that *Patna* opium would fetch at the next Government sale at *Calcutta*; each party knowing that the other might use means to enhance or depress such price. Held, that the bidding at the sale by one of the Plaintiffs, though done colourably, and as it appeared only to enhance the price, was no fraud on the Defendants, or upon the public, as he had a right in common with all the world to bid at such sale, and was not precluded from recovering the amount of such wager contracts by the fact, that such bidding tended to bring about the event by which the wager was to be won.

Held also, that employing agents at such sale (all of whom were cognizant that the object was to enhance the price of opium sold) to bid, there being no *crimen falsi* committed, did not constitute an illegal conspiracy, or such fraud as would vitiate the wager contracts.

The common law offence of engrossing or regrating applies only with respect to the necessaries of life.

By the 6th Article of the Convention between *Great Britain* and *France*, the French Government had a

right to demand, out of the quantities sold at the Government sale, 300 chests of opium at the average rate of sale. Held, that no fraud on the vendors was committed by inducing the French Consul to exercise that option in favour of the Plaintiffs [*Doolubdass Pettamberdass* v. *Ramloll Thackoorseydass*] 109

WILL,

A nuncupative Will by a Mahomedan of the *Shias* sect, bequeathing property, less in amount than one-third of his estate, held valid by the Mahomedan law, and effect given to the bequests,

Semble.—Such verbal bequests would have been valid, even if beyond a third of the testator's estate, provided the heirs concurred in the bequests. [*Nawab Amin-ood-Dowlah* v. *Syud Roshun Ali Khan*] 199

ZEMINDARY.

Family usage and custom, for eight generations, for a *Zemindary* estate in *Bengal*, to descend entire to the eldest son, to the exclusion of the other sons, sustained.

So held, in a suit by younger brothers against the eldest brother, for a partition of the *ilaka* of *Rawutpore*. [*Rawut Urjun Sing* v. *Rawut Ghunsiam Sing*] - 169

See "PACHEET."

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